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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. [redacted] 1

WILLIAM THOMPSON,

Petitioner,

v.

COASTAL OIL COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner, William Thompson, a disabled seaman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above entitled matter.

The Opinions of the Courts Below

The opinion of the District Court (R. 14a-27a; Richard Hartshorne, D. J., sitting as judge and jury, the parties having waived a jury), printed in the Appendix hereto, *infra*, page 13a, is reported in 119 F. Supp. 838, and 1954 A. M. C. 1190.

The original opinion of the Court of Appeals for the Third Circuit; Goodrich, Kalodner and Hastie, JJ., opinion by Kalodner, J., printed in the Appendix hereto, page 6a, is reported in 218 F. 2d 664.

The opinion of the Court of Appeals *en banc* on motion for rehearing and the dissenting opinion by Chief Judge Biggs and Judge McLaughlin, printed in the Appendix hereto, *infra*, page 1a, is not yet reported. The Court of Appeals' opinions are also in the certified Record.

Jurisdiction

The decision and judgment of the Court of Appeals, Third Circuit, sought to be reviewed, was entered January 28, 1955 (Circuit Judges Goodrich, Kalodner and Hastie, Judge Kalodner writing the opinion, ~~216~~ 221 F. 2d ~~664~~ 559).

Thereafter the said Court of Appeals by order made February 28, 1955, recalled the mandate and extended the time for filing a petition for rehearing to March 15, 1955.

Petitioner on March 12, 1955 filed timely petition for rehearing, which was reviewed by the entire Court of seven judges of the Court of Appeals, Third Circuit, *en banc* (Biggs, Chief Judge, Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges).

By "Opinion of the Court" *en banc*, filed April 22, 1955, in a one sentence *per curiam* opinion in which five judges concurred, the Court denied the petition for rehearing; but two judges dissented in an opinion by Biggs, Chief Judge and McLaughlin, Circuit Judge (see original papers certified from Court of Appeals in the original record, and appendix hereto).

The finality of the Court of Appeals judgment was suspended until entry of the April 22, 1955 order on decision of the court *en banc Bowman* v. *Loperena*, 311 U. S. 262, 266 (1940), and cases cited; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 149 (1942); *Dept. of Banking* v. *Pink*, 317 U. S. 264, 266 (1942).

The jurisdiction of this Court is found in 28 U. S. Code, Sections 1254(1) and 2101(c).

Questions Presented

1. Whether the Court of Appeals in reversing the District Court judgment misinterpreted and erroneously deviated from the tests approved by this Court in *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, for determining the validity or invalidity of a seaman's release, and the requirements under *McAllister* v. *U. S. A.*, 348 U. S. 19, and Rule 52 of the Federal Rules of Civil Procedure respecting affirmance or reversal of District Court findings of fact.

2. Whether the "full understanding of his rights" required under *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248, to validate a seaman's release, requires full understanding by the seaman of his actual rights, including the seriousness of his actual incapacity, the strong grounds for liability of the shipowner under the law, and a fair valuation of his claim; as distinct from a mistaken prognosis, representation and evaluation given him by the shipowner's claim agent in securing the release from a seaman having no medical or legal advisers.

3. Whether the "inadequacy of consideration" making the shipowner's burden of proof particularly heavy, and the "adequacy of the consideration" as a factor in appraising the seaman's understanding of his rights, under *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 247-248, are determinable in light of his actual rights, including his actual incapacity shown at trial, and the strong rather than "weak" basis for liability under the law; in contrast to the mistaken prognosis and representations given him by the shipowner's claim agent at the time of procuring the release.

4. Whether evidence that an injured and sick seaman had been deluged while in hospital with "offers of legal service" by ambulance-chasers, but rejected these "solic-

itations", provides the factor, under *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248, of "medical and legal advice available to the seaman at the time of signing the release."

5. Whether the questions of mistake, misrepresentation and overreaching, determinative of the validity of this seaman's release, were questions of fact, the determination whereof by the District Court could not be reversed by the Court of Appeals, as herein, under *McAllister* v. *U. S. A.*, 348 U. S. 19 and Rule 52, Federal Rules of Civil Procedure, because not clearly erroneous.

6. Where the records of two Marine Hospitals where petitioner was treated showed "encephalopathy due to trauma", and the shipowner's claim agent testified that he did not discuss this with petitioner but told him Dr. Farr's opposite prognosis that he would have only a 10% permanent disability and would be fit for work in three months, and testified that if Dr. Farr's prognosis was wrong, he was mistaken in his settlement evaluation, was it proper for the District Court to hold the release invalid and error for the Court of Appeals to reverse?

In the event the writ be granted, we propose also to argue that there was clear liability under this Court's decision in *Boudoin* v. *Lykes Bros. S. S. Co.*, No. 406 October Term, 1954, decided February 28, 1955, and *Keen* v. *Overseas Tankship Corp.* (2 Cir. 1952), 194 F. 2d 515; that there was clear liability also under Sec. 33 of the Jones Act (46 U. S. C. A. Sec. 688; 45 U. S. C. A. Sections 51-60; 18 U. S. C. A. Sec. 2196); and that the claim agent's representations that plaintiff had a "weak case" were (1) false, (2) mistaken, and (3) misleading misrepresentations.

Statutes Involved

"46 U. S. C. A. Sec. 688. Recovery for injury to or death of seaman.—Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

"45 U. S. C. A. Sec. 51. Every common carrier by railroad while engaging in commerce between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or territories and any foreign nation or nations shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees, of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Statement of the Case

The action is by a seaman, under the federal maritime law and statutes relating to seamen, for damages sustained by him from a murderous assault committed on him on shipboard by another seaman with a meat ax.

On the evening of January 12, 1950, while the tanker "Rosina Marron" was in the Gulf of Mexico headed for Corpus Christi, Texas, Thompson, second cook, attended a meeting of crew delegates where he preferred a charge and offered proof of homosexual acts by three seamen. One of the accused, who the weight of evidence indicated was a "queer", left the meeting first and waited in a dark place with a heavy meat ax which he had procured by taking the key to the steward's room. As the plaintiff Thompson walked past him in the dark he struck three blows with all his might on plaintiff's skull. The blows felled the plaintiff, who bled copiously. He did not die, however. The assaulter was put in irons, and later convicted and sent to prison. Thompson was taken to a hospital at Corpus Christi. Later he was a patient at marine hospitals at Galveston, New Orleans and Stapleton.

The defendant and its agent, a Mr. Barron, adjuster for an insurance group, corresponded with the plaintiff from the time he entered the hospital at Corpus Christi until the case was settled.

An advance of $50 was made to him while he was a patient in the hospital at Stapleton; an advance of $300 was made a week or so before the release. Plaintiff used the money to go to Hot Springs, Arkansas, where he took hot baths and came back feeling better; he thought and was led to believe that he was cured; and on June 2, 1950 the plaintiff executed a general release and received a balance of a total payment of $4,000. Only he and Barron were present; plaintiff had neither medical nor legal advisers

Dr. Farr, hired by the shipowner "to help them price the value of this claim" (R. 165a, lines 20, 21), had given Barron a prognosis estimating a 10% permanent disability and that petitioner would be able to return to work as a ship's cook in three months.

The evidence also established and the Trial Court found that when plaintiff attempted after the settlement to return to work as a ship's cook, he was completely and permanently incapacitated for such work.

Both the Galveston and Stapleton Marine Hospitals diagnosed plaintiff's injury as "encephalopathy due to trauma" (R. 318a, 319a). Plaintiff's medical evidence supported this.

Barron testified that he did not discuss "encephalopathy due to trauma" with plaintiff (R. 264a1, 20), but did tell him Dr. Farr's prognosis (R. 260a), and that he would be able to return to work within three months.

Barron also testified that if Dr. Farr's prognosis was wrong, he then was mistaken in his evaluation (R. 271a); and that had he so known, he would not have allowed plaintiff to accept $4,000 but would have told him to get a lawyer (R. 274a).

Barron also told plaintiff that he had on the law a weak case and as to the injuries not serious or permanent (R. 264a).

The Trial Court found that the shipowner was liable on the theory of *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515; *The Rolph*, 299 Fed. 52; and *The Southwark*, 191 U. S. 1.

The Trial Court found that the plaintiff's injury was permanent and much more serious than the doctors at the Marine Hospitals or Dr. Farr or the plaintiff believed at the time of execution of the release; and while observing

plaintiff at trial stated respecting Dr. Farr's prognosis that "He said that was 10 per cent, and if that man is not more than 10 per cent, I'm no judge" (R. 288a).

In setting aside the release the Trial Court applied as did the Supreme Court of the United States in *Garrett* v. *Moore-McCormack,* 317 U.S. 239, the principles established in *Harden* v. *Gordon,* Fed. Case 6047 (1823), that "Every court should watch with jealousy any encroachment upon the rights of seamen."

The Trial Court held that the shipowner was in a better position to determine the condition of the plaintiff than was the plaintiff, who was without legal or medical counsel.

The Trial Court found that Thompson did not have any legal or medical advice, and that he was urged by defendant's representative on an incorrect statement of facts to execute the general release for an inadequate consideration.

The Trial Court awarded him $20,000 less the $4,000 already paid, or $16,000.

The Court of Appeals, Justices Kalodner, Goodrich and Hastie, reversed, in a decision inconsistent with *Garrett* v. *Moore-McCormack, supra,* and inconsistent even with the opinion written by Judge Kalodner in *German* v. *Carnegie-Illinois Steel Corp.,* 156 F. 2d 977, 1949 A. M. C. 285.

The Court of Appeals distinguished the *German* case from the case at bar, on the ground that in this case there was no economic "coercion" as in the *German* case, where the seaman disregarded the advice of his own lawyer.

The dissenting opinion on motion for leave to reargue by Chief Justice Biggs stated:

> "We are of the opinion that rehearing before the court en banc should be granted because we think the release executed by Thompson was invalid."

and concludes:

> "Thompson was a seaman, a ward of the admiralty, and it is clear, as the District Court found in substance, that he was over-reached."

The dissenting judges in the Third Circuit noted this Court's unequivocal precept (*Garrett, supra,* and *German, supra*), that "A seaman's release is not binding if any misrepresentation is made by the shipowner in negotiating the settlement." They also noted Barron's assertion to Thompson that he had a weak case not only on damages but also *on the law*. The original decision of the Third Circuit held this in fact no misrepresentation since at the time of the execution of the release the Court had never declared unseaworthiness to encompass a warranty that the crew be composed of men equal in disposition to the ordinary men in the calling (*Keen* case, *supra*). The dissenting judges in the Third Circuit pointed out that Barron's statement regarding the law was not correct even as it existed at the time the release was executed; that although the *Keen* case was not yet decided the *Keen* doctrine as pointed out by Judge Hand in his decision was "*res integra*" and not a reversal of existing law. As also noted by the dissenting judges, no decided case had stated or inferred that upon the facts known to Barron, Thompson could not recover. The very fact that the precept represented by Barron had not been established made his representation unjustified, and *Keen, supra* shows its error. Barron therefore over-reached himself in his assertion and in turn over-reached Thompson, an ignorant Negro unrepresented by counsel. Additionally, Barron's assertion was a misstatement of the law of negligence applicable to the facts.

Reasons for Allowance of the Writ

The Court of Appeals decision herein deviates from and constitutes a threat to the whole guardianship theory respecting seamen and in effect imposes upon injured seamen more harsh rules than those now applied to cases involving releases executed by injured land employees and even by injured passengers and persons injured in automobile accidents, including business executives.

It also violates Rule 52(a), Federal Rules of Civil Procedure and the rules peculiarly applicable to seamen, in reversing a District Court's findings without holding, and without suggesting any basis for holding, that the findings were clearly erroneous.

The decision affects the rights of every seaman who may be induced by the shipowner's claim agent to execute a release on mistaken and misrepresentative prognosis of his disability and erroneous representations as to liability under the law.

The questions presented are novel in that no Federal Court of Appeals heretofore has ventured in a seaman's case to so depart from the principles uniformly applied for more than 133 years. The importance of review by this Court is magnified by the error and harshness of the Court of Appeals' reversal.

The majority opinion of the Court of Appeals strips from the seaman the protective influence of a court whose ward he was, and also disregards the principle applied in the Second Circuit in *Bonici* v. *Standard Oil Co.* (2 Cir. 1939), 103 F. 2d 437; *Kelcey* v. *Tankers Co., Inc.* (2 Cir. 1954), 217 F. 2d 541; *Stuart* v. *Alcoa* (2 Cir. 1944), 143 F. 2d 178; *Sitchon* v. *American Export Lines* (2 Cir. 1940), 113 F. 2d 830; *Hume* v. *Moore-McCormack Lines* (2 Cir. 1941), 131 F. 2d 336.

This Court held in *Garrett* v. *Moore-McCormack Co., Inc.,* 317 U. S. 239 (1942), that seamen are emphatically the wards of the Court; that the same principles of equity apply to their release contracts as in the cases of young heirs, wards and their guardians, *cestuis que trust* and trustees; and that the burden is upon the one who sets up an injured seaman's release to prove its validity, and not upon the seaman to establish its invalidity. This was in accord with and cited and quoted from the memorable decision of Mr. Justice Story, sitting at Circuit 133 years ago, in *Harden* v. *Gordon,* 2 Mason 541, 11 Fed. Cases 480, No. 6047.

An excellent discussion and application in a court of equity of the controlling principles is in *Bensel* v. *Anderson,* 85 N. J. Eq. 391 (1915), where the Court said:

> "Where parties hold positions where one is more or less dependent upon the other, courts of equity hold that the weaker party must be protected, and they set aside his gifts . . ." (85 N. J. Eq. 394)

By contrast, in *Callen* v. *Penn. R. R. Co.,* 332 U. S. 625 (1948), this Court held that in personal injury cases other than those of seamen, including FELA cases of railway employees, one who attacks a settlement release has the burden of showing its invalidity;—the principal argument in the *Callen* case, indeed, having been of the question whether, and the dissent of four justices having expressed the view that, releases of railway employees under FELA should be governed by the opposite and more liberal rule applicable to releases executed by seamen.

Yet this Court and the Courts of Appeals of many of the circuits have uniformly held—in contrast to the harshness of the reversal herein—that even in cases not involving seamen or wards, a release may be set aside or disregarded by a District Court fact-finder, whether judge or jury, for either mistake or misrepresentation as to the

injured person's state of recovery or as to the extent or permanancy of his disability when the release was executed, *i. e.*:

In cases of injured railway employees under FELA:

Callen v. *Penn. R. R. Co.*, 332 U. S. 625 (1948);
Dice v. *Akron, Canton & Youngstown R. R. Co.*, 342 U. S. 359 (1952);
Gifford v. *Wichita Falls & S. R. R. Co.* (5 Cir. 1954), 211 F. 2d 494;
Chicago & N. W. Ry. Co. v. *Curl* (8 Cir. 1950), 178 F. 2d 497;
Graham v. *Atchison T. & S. F. Ry. Co.* (9 Cir. 1949), 176 F. 2d 817;
Thompson v. *Camp* (6 Cir. 1947), 163 F. 2d 396;
Ricketts v. *Penn. R. R. Co.* (2 Cir. 1946), 153 F. 2d 757;
Great Northern R. R. v. *Fowler* (9 Cir. 1905), 136 Fed. 118, cert. den. 197 U. S. 624.

In cases of other master and servant injured employees:

Lion Oil Refining Co. v. *Albritton* (8 Cir.), 21 F. 2d 280.

And even in cases of injured railroad passengers:

Ciletti v. *Union Pac. R. R. Co.* (2 Cir. 1952), 196 F. 2d 50.

Bus passengers:

Tulsa Lines v. *Maines* (10 Cir. 1939), 107 F. 2d 377, 380.

Motor car passengers:

Scheer v. *Rockne Motors Corp.* (2 Cir. 1934), 68 F. 2d 942, 945.

Persons injured in automobile accidents:

Southwest Pump & Machinery Co. v. *Jones* (8 Cir. 1937), 87 F. 2d 879;
Robert Hind, Ltd. v. *Silva* (9 Cir. 1935), 75 F. 2d 74.

In the *Callen* case (332 U. S. 625), affirming reversal of a judgment for plaintiff for error in the charge which had treated the release question as one of law rather than of fact, this Court held that the issue as to the invalidity of the release, by reason of mistake or fraud, is an issue of fact, for determination by the fact-finder —there a jury (332 U. S. 628, 629). Hence the decision of the fact-finder herein—a judge—should also be final.

Dice v. *Akron, Canton & Youngstown R. R. Co.*, 342 U. S. 359 (1950), reversed a State Supreme Court and reinstated a verdict for $25,000, holding that whether a release for $924.63 was a bar was an issue of fact which had been determined by the jury as the fact-finder.

The recent decision of this Court in *McAllister* v. *U.S.A.*, 348 U. S. 19, establishes that in reviewing a seaman's case, where a Court of Appeals has reversed a recovery by a seaman in a case tried by the Court without a jury, this Court is in the same relation to the District Court's findings as the Court of Appeals; the question in this Court alike as in the Court of Appeals is "whether the findings of the District Court are clearly erroneous"; and this Court will reverse the Court of Appeals and affirm the District Court unless the District Court's findings are clearly erroneous.

The specific question is novel in this Court with reference to releases. But we submit that this doctrine applies equally to the factual determination by a District Court that a seaman's release is invalid and not a bar, whether for mistake, fraud, oppression, or over-reaching.

In *Dice* v. *Akron, Canton & Youngstown R. R. Co., supra,* 342 U. S. 359 at 362, a railway servant case subject to the *Callen* case doctrine, this Court, in reversing the Ohio Supreme Court, pointed out that:

> "In effect the Supreme Court of Ohio held that an employee trusts his employer at his peril."

Here, even more harshly, particularly since *Garrett* v. *Moore-McCormack* and not the *Callen* case applies, the Third Circuit Court of Appeals has held, in effect, that an ignorant Negro seaman trusts the ship owner guardian fiduciary at his peril.

The extraordinary harshness of the decision herein appears by contrasting *Ciletti* v. *Union Pac. R. R. Co.* (2 Cir. 1952), 196 F. 2d 50. There two passengers (husband and wife) injured January 30, 1948, in a railway accident, were treated at the expense of the railroad, and settled on March 8, 1948 and executed general releases for payment by the railroad of $6,500 (allocated $1,500 to the husband and $5,000 to the wife), in addition to all hospital expenses. Treated by the company doctors, they had been told, and the doctors believed, that the injuries were healing satisfactorily, and that they would be able to return to work by July 1, 1948. The Second Circuit Court of Appeals, holding the release not a bar, affirmed judgment for plaintiffs for an additional $10,000 for the wife and $2,500 for the husband. Quoting from *Scheer* v. *Rockne Motors Corp.* (2 Cir. 1934), 68 F. 2d 942, 945, the Court said:

> "To tell a layman who has been injured that he will be about again in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it is ordinarily more than a forecast; it is an assurance as to his present condition, and so understood."

The Third Circuit decision herein is more than a direct conflict with the Second Circuit decision in the *Ciletti* case, *supra;* for the *Ciletti* case involved a release executed by business people who were injured as passengers, and respecting whose contracts such as releases the law evinces no such guardianship solicitude as that toward seamen. They had been paid $6,500, as compared to $4,000 paid seaman Thompson herein; their additional damage was $12,500 as compared to Seaman Thompson's additional damage of $16,000. They had a jury while Thompson's case was tried before a Distirct Court Judge without a jury. There would be more direct conflict if the plaintiff Thompson herein were a business man rather than a seaman. But this, we submit, should be *Thompson's* and not the *Cilettis'* advantage. Thompson being a seaman, the difference in the Second Circuit's affirming a District Court judgment setting aside the release in *Ciletti* and the Third Circuit's reversing and holding the *Thompson* release a bar herein, is revolutionary in its comparative harshness to the seaman.

In *Thompson* v. *Camp* (6 Cir. 1947), 163 F. 2d 396, a railroad employee settled for $500 on statement *by a doctor who was not the company doctor* that "he was O.K.; he could go back to work." The jury returned a verdict that there was no fraud but there was a mistake, and the Sixth Circuit Court of Appeals held that:

> "The fact that such representations were made by one who was not an employee or agent of the appellant would be material if we were considering a case of fraud. But that issue was eliminated by the jury's verdict. Camp was acting under a mistake of fact regardless of how the mistake arose" (163 F. 2d 401).

If the Sixth Circuit was correct in *Thompson* v. *Camp*, then we submit the Third Circuit clearly erred in reversing herein, particularly since the injured seaman peti-

tioner herein is entitled to the *Garrett* v. *Moore-McCormack* doctrine and not subject to the rule of the *Callen* case.

In *Chicago & N. W. R. R. Co.* v. *Curl* (8 Cir. 1950), 178 F. 2d 497, a railroad fireman was injured September 19, 1947, and on November 4, 1947, executed a general release for $700. In his own handwriting he copied into the release a statement also printed therein that:

> "I have read this release and understand that I can make no further claim against the Railroad Company even though my injuries are more serious or different than I now know or understand them to be."

On November 18, 1947, the company doctor treating him reported to the company that he would be able to resume his duties as fireman on November 25. The doctor testified this certificate was at plaintiff's request. He returned to work and worked through December but in January, 1948, he suffered from such pain and physical disability that he found it impossible to continue on his regular run. By June 1948 he was compelled by his injuries to abandon his attempt to work. The jury found that there was no fraud or deceit, but that the release was entered into as a result or mutual mistake of fact and gave a verdict of $50,000. Affirming the judgment, the Eighth Circuit Court of Appeals said:

> "Appellant's evidence leaves little room for doubt that the physician who examined the appellee on behalf of the railway company, the claim agent who settled the claim, and the appellee honestly believed that appellee's injuries were of minor character and that his complete recovery was assured for the immediate future. There was a mistake of both parties concerning a present fact material to the contract . . .
>
> "It was only necessary that he produce evidence which, read in the light most favorable to him, supported a finding of the jury that at the time of the

> release appellee was suffering from a substantial and severe injury from which, at best, recovery was doubtful, and that the release was given in the mistaken belief on the part of appellee and appellant, honestly but erroneously held, that appellee's injury was not permanent nor serious, but on the other hand of a minor character from which his complete and early recovery was certain'' (178 F. 2d 501-502).

The Third Circuit's reversal of Thompson's judgment herein would conflict with the Eighth Circuit's decision in the *Curl* case, even were Thompson a railroad employee suing under FELA, subject to this Court's ruling in the *Callen* case. The conflict is the greater, and is revolutionary, since Thompson is a seaman to whom the principles of *Garrett* v. *Moore-McCormack* apply.

As to invalidity for mistake or misrepresentation of an injured man's rights under the law, the case is in conflict with *Camerlin* v. *N. Y. C. R. R. Co.* (1 Cir. 1952), 199 F. 2d 698, a FELA case of a railroad employee. The railroad's claim agent believed and represented to Camerlin that Camerlin's claim was governed by a state workmen's compensation law under which he would be entitled to approximately $950. On these representations he signed a release for $950, where in reality he had a FELA case. Reversing a summary judgment for defendant, the First Circuit said:

> ''It is enough if the plaintiff was induced to execute the release by a mistake of law, where such mistake was caused by his justifiable reliance upon even an innocent misrepresentation of law made by the representative of the railroad. See Am. L. Inst., Restatement of Restitution § 55, and Comment c. In the present case the claim agent of the railroad, negotiating a settlement with an uneducated employee unassisted by the advice of legal counsel, would from his

very position naturally be supposed to know what he was talking about as to the employee's right to compensation under the state law" (199 F. 2d 703-704).

In *Gifford* v. *W. F. & S. Ry. Co.* (5 Cir. 1954), 211 F. 2d 494, plaintiff, a FELA employee, suffered loss of a foot and despite a $6000 settlement and release, the Fifth Circuit reversed judgment for defendant, entered on directed verdict, where plaintiff alleged and testified that:

". . . he was induced by appellee's agent to execute a release of his claim for the sum of $6000, relying upon the promise of appellee's agent that he would receive in addition a lifetime job with appellee . . . and that he relied upon the representation of appellee's agent because of their relationship of trust and confidence and appellee's superior knowledge of the law" (211 F. 2d 496).

In *Gill* v. *Seaboard Airline R. R. Co.* (4 Cir. 1953), 208 F. 2d 7, 12, even in a case where mistake could not be relied on under applicable state law, it was held a release will be set aside where a grossly inadequate consideration was paid in a death accident and the administrator was an ignorant Negro. The Court pointed out:

"He was confronted by an opposing lawyer and by other persons of greater experience and intelligence than himself, without any attorney to guide him; and he was paid a grossly inadequate sum of money as compensation for the death of three persons if the railroad had any liability for the accident."

Very recently in *Marshall* v. *N. Y. C. R. R. Co.* (7 Cir. 1955), 218 F. 2d 900, also a FELA death case, where the claim had been released for a payment of $4,350, judgment on verdict directed for defendant was reversed. The Court said:

> "In every case of which we are aware, decided in recent times and involving the question of the validity of a release from liability under the Federal Employers' Liability Act, a directed verdict in favor of the defendant, a summary judgment in favor of the defendant or a judgment notwithstanding the verdict, has been reversed" (218 F. 2d 905).

In contrast to the foregoing cases of persons subject to harsher rules than seamen, the decision herein precludes avoiding a *seaman's* release for mistake; it nullifies the burden on the shipowner under *Garrett* v. *Moore-McCormack, supra,* to show a seaman's "full understanding of his rights."

The very fact that a majority of a Federal Court of Appeals of seven judges sitting *en banc,* with two judges dissenting, can so deviate from the rules established by this Court's decision in *Garrett* v. *Moore-McCormack,* 317 U. S. 239 (1942), and hold a seaman bound by release despite proof which would relieve others than seamen from releases under the above cited cases, particularly the *Callen, Dice, Ciletti, Curl, Camerlin, Gifford, Gill* and *Marshall* cases, shows that the questions herein are of the greatest importance and warrant review to further clarify and require enforcement of the principles of *Garrett* v. *Moore-McCormack* (*supra*) and the application in release cases of Rule 52(a) and *McAllister* v. *U. S. A., supra.*

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

SILAS BLAKE AXTELL,
Counsel for Petitioner.

ELMER C. MILLER,
CHARLES A. ELLIS,
JOHN A. GLEASON,
MARTIN G. STEIN,
Of Counsel.

Opinion of the Court of Appeals *en banc* on Petition for Rehearing

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,315.

SUR PETITION FOR REHEARING

Present: BIGGS, Chief Judge, and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, Circuit Judges.

(Filed April 22, 1955.)

Per Curiam

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

BIGGS, Chief Judge, and McLAUGHLIN, Circuit Judge, dissenting.

We are of the opinion that rehearing before the Court *en banc* should be granted because we think the release executed by Thompson was invalid. As was held by the Supreme Court in *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U. S. 239 (1942), discussed by the Court in this case and in *German* v. *Carnegie-Illinois Steel Corp.*, 169 F. (2d) 715 (3 Cir., 1948), a seaman's release is not binding if any misrepresentation is made by the shipowner in negotiating the settlement. In this case the negotiator for the ship-

owner, Barron, told Thompson that Thompson had "a weak case" both as to measure of damages and the law. As a matter of fact Thompson had suffered more serious injury than his, Thompson's, doctor had realized and Barron's statement to Thompson was probably innocent though it worked damage to Thompson's cause. Thompson is a Negro with but slight formal education, who had suffered a severe head injury and had developed psychoses. DX2 indicates that about the time he executed the release he was in a confused state of mind. As the opinion of this Court reveals, Barron premised his statement that Thompson had a weak case on the law on the asserted conclusion that he could recover from the shipowner only because of the shipowner's negligence and not on the theory that the ship was unseaworthy because of the vicious propensities of the member of the crew who had attacked Thompson.

This was not a correct statement of the law even as it existed at the time the release was executed. While *Keen* v. *Overseas Tankship Corp.*, 194 F. (2d) 515 (2 Cir., 1952), was not decided at that time, Judge Learned Hand said in that decision that under prior precedents the question of whether a deficiency in the quality of a crew constituted unseaworthiness was *res integra*.[1] Judge Hand's statement was correct. Quite apart from history and niceties

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[1] Cf. *Lykes Bros. S. S. Co.* v. *Boudoin*, 211 F. 2d 618 (5 Cir. 1954). The Supreme Court in 1955 sustained the Second Circuit view. Mr. Justice Douglas said: "We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other . . . A vessel bursting at the seams might well be a safer place than one with a homicidal maniac as a crew member." *Boudoin* v. *Lykes Bros. Steamship Co.*, U. S. , (1955). (No. 406, October Term 1954, decided February 28, 1955.

of language, Barron's statement as to the status of the law was incorrect and if he did not know this he should have for no decided case lay against Thompson.

Barron's conduct was subject to the inference, which the Court below in effect drew, that he was trying to procure a release from an ignorant and confused seaman on terms most favorable for his client, the shipowner. Barron made use of the sort of language which claim adjustors are accustomed to use when dealing with a claimant with whom they are entitled to negotiate at arm's length. But Thompson was a seaman, a ward of the admiralty, and it is clear, as the District Court found in substance, that he was over-reached.

A true copy:

Teste:

CLERK OF THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,315.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: GOODRICH, KALODNER and HASTIE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby re-

versed, with costs, and the cause remanded with instructions to proceed in accordance with the opinion of this Court.

Attest:

IDA O. CRESKOFF,
Clerk.

January 28, 1955.

Received and filed January 28, 1955,

IDA O. CRESKOFF,
Clerk.

Order Recalling Mandate and Extending Time to File Petition for Rehearing

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,315.

Present: GOODRICH, KALODNER and HASTIE, Circuit Judges.

Upon consideration of the application by appellee.

It is ORDERED that the mandate issued on February 21, 1955 in the above case be, and it is hereby recalled.

It is further ORDERED that the time for filing a petition for rehearing be, and it is hereby extended to March 15, 1955, said petition to be in typed form.

By the Court,

KALODNER,
Circuit Judge.

February 28, 1955.

Received and filed February 28, 1955,

IDA O. CRESKOFF,
Clerk.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,315.

SUR PETITION FOR REHEARING

Present: BIGGS, Chief Judge, and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court,

KALODNER,
Circuit Judge.

Dated: April 22, 1955.

Received and filed, April 22, 1955,

IDA O. CRESKOFF,
Clerk.

Opinion of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,315

WILLIAM THOMPSON,

v.

COASTAL OIL COMPANY,

Appellant.

Appeal From the United States District Court for the District of New Jersey.

Argued October 11, 1954

Before GOODRICH, KALODNER and HASTIE, *Circuit Judges*

OPINION OF THE COURT

(Filed January 28, 1955)

By KALODNER, Circuit Judge:

This is a seaman's action instituted against defendant shipowner to recover damages for an assault by a member of defendant's crew. The case was presented below upon a complaint for (a) negligence under the Jones Act, 46 U. S. C. 688; (b) unseaworthiness under the admiralty and

maritime laws; (c) maintenance and cure.[1] The District Court, sitting without a jury, held a previously negotiated release for $4,000 invalid, and entered judgment for the plaintiff in the sum of $16,000.

The relevant facts are as follows: plaintiff Thompson, a veteran ship's cook, was employed on one of defendant's tankers. On January 12, 1950, Thompson claims to have seen one Medina, a crew messman, engaged in a homosexual act with two other members of the crew. He immediately reported the matter to the chief steward and to the union delegate. On January 13, 1950, a union meeting was called to decide whether the incident should be reported to the Coast Guard or Medina compelled to leave the ship. Medina left the meeting a few minutes before the group dispersed. Some short time later Thompson, as he turned the corner on the boat deck, was struck from behind on the head by a meat cleaver wielded by Medina.

Thompson was removed from the ship on January 15, 1950, and taken to the Marine Hospital at Corpus Christi, Texas. He remained at this institution until February 10, 1950. Then followed periods of hospitalization at various Marine hospitals:

New Orleans	February 10 to March 18
Galveston, Texas	March 20 to March 21
Galveston, Texas	March 25 to April 1
Stapleton, Staten Island	April 9 to April 28.

His condition was diagnosed as "Encephalopathy due to trauma" or "disease of the brain caused by wound or injuries."

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[1] The issue as to maintenance and cure was not pressed below and does not form part of this appeal.

After his discharge from Stapleton on April 28, 1950, the plaintiff lived for a few days at the Seaman's Church Institute on South Street, New York. He then voluntarily called on defendant's agents, where after complaining of head pains, he expressed a desire to go to Hot Springs, Arkansas for a period of rest. Defendant's agents asked him how much he needed for this purpose and in accordance with the plaintiff's request gave him $300.00.

Three weeks later he returned and at defendant's suggestion was examined by Dr. Charles A. Farr on May 18, 1950. Dr. Farr reported that the plaintiff had a ten percent permanent disability and would not be able to work for three months. The prognosis made by the Stapleton Hospital had been for a "good recovery", and that institution suggested he would be able to work on May 29, 1950 or nearly three months earlier than had been suggested by Dr. Farr, the defendant's own physician.

Thompson was then sent to one Mr. Barron of the Shipowners Claim Bureau, an organization which adjusts claims for shipowners. There he signed a release of all claims arising out of the assault for $4,000. During this negotiation plaintiff was not represented by counsel.

Since the signing of the release plaintiff has continued to suffer from the effects of the head blow, having been hospitalized at New Orleans from November 13, 1952, to December 15, 1952, and at Stapleton from February 16, 1954 to February 23, 1954. In fact, Thompson is still receiving out-patient treatment.

While he has procured work at levels of remuneration and status above and below that which he commanded prior to the assault, it is patent that his injuries have proved more serious than was thought at the time of the release.

We are of the opinion that the District Court committed error in striking down this release. We therefore confine our discussion to this facet of the appeal.

Garrett v. *Moore-McCormack*, 317 U. S. 239 (1942), is the leading authority as to the criteria by which the conclusiveness of release is to be judged. From that case the following principles emerge:

(1) The burden of proving the validity of a release rests upon one who sets up the release and this burden can be carried only by showing that "it was executed freely, without deception or coercion." (p. 248).

(2) The release must be shown to have been fairly arrived at and made by the seaman with a full understanding of his rights.

(3) "The adequacy of the consideration and the nature of the medical and legal advice available to the seaman *at the time of signing the release* are relevant to an appraisal of this understanding." (Emphasis supplied) (p. 248).

Viewed by these standards we think the release here in ssue is binding. The settlement of $4,000 was generous hen considered in the light of the medical reports. True, ne plaintiff is now known to have suffered to a greater xtent than was previously thought. But the very nature nd purpose of settlement presupposes a joint *approxima-on* of the future. The validity of a release is not condi-oned upon the prescience of the parties.

The District Court based its ruling in part upon the rounds that the plaintiff was not represented by counsel r was he examined by a physician of his choosing. As lack of counsel—there is no evidence that the plaintiff as pressed to complete the settlement immediately so as

to preclude the procuring of counsel. Moreover, during his hospitalization plaintiff was literally deluged with offers of legal service. He resolved, however, to reject all of these solicitations and to exercise his own judgment in the prosecution of his claim. In this connection it is of relevance that Thompson had previously negotiated releases.

Certainly the defendant was not bound to demand that the plaintiff engage counsel as a condition of entering into a release. The plaintiff independently resolved to forego professional aid. We cannot say that defendant has failed to show an absence of coercion on this score.

It is true that the plaintiff did not have independent medical advice of his choosing. The District Court ruled that had the defendant not told Thompson of Dr. Farr's report and represented it to be correct, a legally different situation would have been presented, for then Thompson presumably would have been free to rely on his own judgment. It must be kept in mind, however, that the Stapleton Hospital, certainly a presumedly neutral party, had predicted a speedier recovery than that forecast by Dr. Farr, the defendant's own physician. Surely a release may be binding without the presence of medical advocates for each side.

The District Court also cited as bases for its decision that the defendant, through its agent Barron, had made false though innocent, misrepresentations of fact and law to the plaintiff. The contention of legal misrepresentation is grounded on the fact that Thompson had been told the success of his case was dependent upon a showing that the defendant had or should have had notice that Medina's presence created a risk of danger to the crew. This statement was urged to be of crucial significance because subsequent to the execution of the release the Second Circuit in *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515 (1952),

cert. denied 343 U. S. 966 (1952), held that the law of unseaworthiness embraced not only a shipowner's warranty as to the physical condition of the ship, but a warranty that the crew is composed of men "equal in disposition and seamanship to the ordinary men in the calling." In fact, the District Court adopted this ruling as the foundation for its decision of liability in the case at bar. We find it wholly unnecessary to express our views on this doctrine or its applicability to the presented facts. It is sufficient to note that at the time of the execution of the release the courts had never made a declaration that unseaworthiness encompassed a warranty that a crew be composed of men "equal in disposition . . . to the ordinary men in the calling."[2] The *Keen* case, speaking colloquially, cannot be given *ex post facto* effect for the purpose of making defendant's statement a "misrepresentation".

Similarly, the "misrepresentation" as to Thompson's actual physical condition, being grounded on available and honestly entertained opinion, cannot be made the basis for nullifying this settlement. The premise of all settlements is the unpredicability of future contingencies. The law requires only that there exist a fair and open basis upon which to gauge these contingencies in arriving at a compromise.

Plaintiff urges the relevance of *German* v. *Carnegie-Illinois Steel Corp.*, 169 F. 2d 715 (1948) in which we struck down a release. There, however, it was clear that economic coercion by the shipowner was of critical im-

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[2] In the *Keen* case the Second Circuit recognized this to be so. *Boudoin* v. *Lykes Bros.*, 211 F. 2d 618 (1954) (C. A. 5), refusing to follow the *Keen* decision, is not to the contrary, for while the court disagreed that the point was *res integra*, it did not state that prior decisions had granted recovery on the basis of unseaworthiness but that liability had been *denied* on this basis.

portance in motivating the settlement, for although the seaman involved was unable to work for some period of time he was not paid maintenance and cure to which he was indisputably entitled by law. There was no such economic coercion in the instant case. The plaintiff was hospitalized for five of the six months during which he would otherwise have been entitled to maintenance and cure. It is to be noted also that he was given $300.00 for the purpose of making a trip to Hot Springs, Arkansas, for convalescence.

For the reasons stated, the judgment of the District Court will be reversed and the cause remanded with instructions to proceed in accordance with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Opinion of U. S. District Court

Appearances:

ELMER C. MILLER, Esq.,
By Silas Blake Axtell, Esq.,
John A. Gleason, Esq.,
For Plaintiff.

FRANCIS M. MCINERNEY, Esq.,
By Michael E. Hanrahan, Esq.,
For Defendant.

HARTSHORNE, District Judge:

Does a potpourri of homosexuality and attempted murder create an unseaworthy ship? Such is the primary issue here presented, the other, the validity of a seaman's release.

Plaintiff Thompson, a colored cook, long at sea, signed on the S.S. "Rosina Marron", a tanker owned and operated by defendant. The vessel carried a complement of some forty men, including among them one Medina, a Cuban, as crew messman. Medina was definitely effeminate, a "queer", called "Rosina" or other feminine names by all aboard the ship, who at times was seen kissing other members of the crew. This was clearly not to the liking of Thompson, a big, clean-cut masculine individual, who neither smoked nor drank. But nothing outwardly had occurred between the two on their voyage from Marcus Hook, Pennsylvania, to Corpus Christi, Texas, in January 1950, save some words when Medina repeatedly gave Thompson the crew's "short orders" in Spanish, which Thompson could not understand, as he had repeatedly advised Medina.

The testimony further indicates that one Pittaway, to whose room Medina constantly resorted after evening chow, had been given a wrist watch by Medina and was apparently a favorite of his. Thompson, who was fond of cards, was accustomed also to go to Pittaway's room, shared with one Schopf, to get Pittaway and Medina, and perhaps others, to play cards with him, later in the evening. The night of January 12, 1950 Thompson went to Medina's room or "fo'c'sle", found the door not open as usual, but closed, and on entry says he found Medina and Pittaway, and Schopf, as well, engaged in a homosexual act. Neither Medina nor Pittaway testified. Schopf denied such acts himself, and also on the part of the other two. But Schopf does admit that when Thompson entered, he said to Thompson that "it was a good thing you came". So the innate tendencies of Medina were obviously finding an outlet at that time, at least with Pittaway.

In any event, it is clear that Thompson promptly stated what he had seen, both to his superior, the Chief Steward, Schiffers, and to their Union delegate, Kaplus. So the Union delegate called a meeting of all concerned, to decide whether to report the matter to the Coast Guard, or to have it settled then and there at the Union meeting, as to whether Medina should be compelled to leave the ship.

But this Medina refused to do, going into no details, but simply making a flat denial of the charge, and leaving the meeting. However, he did not leave till after one of those present had called Thompson's attention to the fact that he, Thompson, was the only one to support and make the charge to the Coast Guard against Medina and the others.

A few minutes later the meeting broke up, the rest leaving more or less together. Suddenly, as Thompson, in the darkness, turned a corner on the boat deck, he was struck on the head from behind three times, by what afterwards

turned out to be his own heavy meat cleaver, and Medina's high-pitched voice cried "I'm going to kill you." Were it not for the fact that Thompson's skull was much thicker than ordinary, as the doctors testified, this intent of Medina would undoubtedly have succeeded. As it was, Thompson's thick skull was cut through both tables. He was promptly given first aid, taken to his stateroom in critical condition, with unconsciousness for an uncertain period, lifted ashore at Corpus Christi and taken to the hospital there, on landing the next day. A short time after the vessel docked, the Coast Guard saw him but briefly in his then critical condition, and made a report on the situation, but apparently interviewed the other witnesses but casually, though objections to the introduction of the report in evidence were withdrawn toward the close of the trial. However, both for the above reason and because the truth as to Medina's homosexuality with Pittaway is relatively unimportant, as shown later, this report is of little moment. Medina was ultimately tried and convicted on the murderous assault charge, the homosexual angle of the matter apparently not being moved under the circumstances. Meanwhile, Thompson was moved from the Corpus Christi Hospital to the New Orleans Hospital, as well as to others, and later to that at Stapleton, Staten Island, at the latter of which he received both in-patient and out-patient treatment, the latter still continuing to the present day.

Thompson still claims to be suffering from severe pains in the right side of his head, the site of the injury, down through the side of his face and ear, with hot and cold spells there, severe headaches, and a peculiar restless and dissatisfied urge, which drives him continually, to get away from himself, and from whatever he is doing to something else. In April 1950, when he was first discharged from the U. S. Marine Hospital at Stapleton, the diagnosis was

"encephalopathy due to trauma", *i. e.*, brain damage due to a blow, and the medical testimony indicates the above symptoms are all typical of that condition. True, he had had certain diseases, such as lues, duodenal ulcer, etc., all of which might have had a bearing on his neuropsychiatric condition, but the testimony clearly indicates the major cause of his neuropsychiatric condition to have been the fractures of his skull by the meat cleaver in the hands of Medina.

Meanwhile, shortly after his first discharge from Stapleton, April 28, 1950, he went to one Barron, of the Ship Owners Claim Bureau, representing defendant, to get settlement moneys on his case, having refused the importunities of a series of lawyers who sought to represent him. Meanwhile, Barron, or another agent of the defendant, had had Thompson examined by their Dr. Farr, who reported that Thompson then, in May 1950, would be able to return to work in three months, and had but a 10% permanent disability. This was in fact somewhat similar to the prognosis then made by the hospital itself, which was for a "good" recovery, and that he would be fit for duty May 29th. But that both Dr. Farr and the hospital were incorrect in their prognosis as to the length and amount of Thompson's mental and neuropsychiatric disability appears quite clear. For instance, not three months, but a year, later, we find him again confined in the Stapleton Hospital, where, among the treatment of other disconnected conditions, we find he had a "neuropsychiatric consultation", and a year after that, at the New Orleans Hospital, he was diagnosed, among other conditions, as having a "schizophrenic reaction". Finally, now, three and one-half years after Dr. Farr's examination, Thompson is still receiving out-patient treatment at the Stapleton Marine Hospital, where they recently gave him a head X-ray, obviously in order to ascertain any

objective basis for his neuropsychiatric complaints. While the X-ray was negative, Dr. Farr himself admits these complaints are real, not sham. Furthermore, the undisputed testimony shows that Thompson can not serve in his old position as cook, since the heat of the stove so seriously affects the pains in his head, and that he now is acting as a utility or mess man. Not only is this a job of lower rating than cook, but it of course carries substantially lower pay.

In any event, at Thompson's settlement conferences with Barron, the latter, or defendant's other agent, told Thompson of this prognosis of Dr. Farr, now found to be incorrect, and Barron refused to consider any greater settlement figure than $4,000.00 because he insisted to Thompson that Thompson was practically well then. Barron admits that if he had then known that Dr. Farr's prognosis was incorrect and that Thompson's future would be as serious as it has now turned out to be, he would not have evaluated his case at $4,000.00, but would have told Thompson to get a lawyer before he settled. Barron also told Thompson he thought he had a weak case on liability. For at that time the case of *Keen* v. *Overseas Tankship Corp.* (2 Cir. 1952), 194 F. 2d 515, cert. den. 343 U. S. 966, had not been decided, and Barron thought that notice to defendant of Medina's alleged vicious character, a difficult thing to prove, was essential, in order to impose liability on the owner of the ship. But it is clear that this is not the law, and that a seaman can recover if hurt by unseaworthy personnel, in the same way that he can if he is hurt by unseaworthy materiel, and quite regardless of the ship owner's notice or negligence.

Thus, as a result of these incorrect, though not intentionally false, statements of both fact and law to Thompson, this man, unrepresented by counsel, and without any independent medical advices of his own, signed a full re-

lease of his rights for the sum of $4,000.00. Such are the facts in outline.

These facts were presented to this Court sitting without a jury, on waiver by both sides, upon a complaint (a) for negligence, under the Jones Act, (b) for unseaworthiness, (c) for maintenance and cure, though the last named cause of action is not pressed, under the circumstances. To this complaint defendant entered appropriate denials. We turn to the legal issues.

The recovery under the Jones Act, and derivatively under the Federal Employers' Liability Act[1] depends upon the negligence of the employer, and this, in turn, depends upon plaintiff's proving that defendant did not use reasonable care to provide plaintiff with a reasonably safe place to work, which caused his injury, in that he was subjected to working with a crew member—Medina—of a vicious disposition and not of a disposition equal to that of the ordinary member of a crew. *Keen* case, *supra*. To support such a cause of action, plaintiff must also show that defendant knew that Medina was either actually homosexual and dangerous, as distinguished from being merely effeminate, or, on the other hand, was otherwise vicious, in being willing to premeditatedly murder on provocation, as above. But since these elements of defendant's negligence and knowledge are not essential to recovery for unseaworthiness, and the quantum of damages in either aspect is much the same, we turn to the consideration of the case in the latter aspect.

Unseaworthiness

The *Keen* case, decided since the occurrences herein, in fact since the execution of the release herein, correctly holds that a vessel can be rendered unseaworthy either

[1] Jones Act, 41 Stat. 1007, 46 U. S. C. A. 688, Federal Employers' Liability Act of April 22, 1908, 45 U. S. Code, Sections 51-59.

by defective materiel or personnel, provided the latter be shown to be not the "equal in disposition and seamanship to the ordinary men in the calling". Thus an owner would be liable "if he signs on a homicidal paranoic whose appearance does not betray his disposition". This case further makes clear the fact that, just as a latent defect in materiel, unknown to the shipowner, suffices to render a vessel unseaworthy, so personnel, defective under the above standard, renders a vessel unseaworthy, and the owner liable, even if such defect is latent and unknown to the owner. The question then is, whether, in fact, Medina was, while perhaps not "competent to meet all contingencies (nevertheless) equal in disposition and seamanship to the ordinary men in the calling".

Clearly Medina was outstandingly effeminate, and it may well be, as plaintiff claims, that such an outstandingly effeminate individual is actually homosexual, though such homosexual acts be unknown. It may further be that such a homosexual, in fact, is inherently vicious, with murderous tendencies. But no proof has been offered to support such a claim, and this Court certainly cannot take judicial notice of any psychologic, or psychiatric, claim which is so esoteric.

On the other hand, it is clear that this outstandingly effeminate individual, when charged with having committed this homosexual act, did, when he found that but one man could support this charge, promptly and cunningly plan to murder that man. For hardly had he ascertained the fact that the lips of but one man could make that charge, when he left the meeting, specifically called to consider his case, secretly got the key to the galley where Thompson's meat cleaver was kept, hid it in his shirt, concealed himself in a dark doorway by which he knew Thompson would shortly pass, and then, with the cry "I'm going to kill you", struck the owner

of those lips in the head, not once, but thrice, with this heavy meat cleaver.

No more vicious crime can well be imagined. Nor was it one executed on the spur of the moment, but by plan and premeditation. To say that a man who was willing to do this was but of the character of the usual seaman is indeed a slander upon all who go to sea. Of course they are a rough and ready lot, handy with their fists and had Medina attacked Thompson with his fists, because of Thompson's charge, Medina might well be considered a fit companion for the others on the ship. But fisticuffs differ as widely as the sea itself from a planned murder with a meat cleaver.

Much testimony was taken, and much argument ensued on the question of fact as to whether the above homosexual act of Medina did, or did not, occur. To this Court, this question seems largely immaterial. For it only goes to the particular species of provocation which induced Medina to plan and carry out the attempted murder of Thompson. If the homosexual act had been committed, then Thompson was making a true charge as to Medina. If, on the other hand, it had not been committed, then Thompson was making an untrue charge against Medina. But whether Medina was the more provoked by the making of a true charge or an untrue charge is immaterial. In any event, none but a man of truly vicious propensities would have attempted to murder the one making such a charge, whether true or untrue.

Looking at the matter from another angle, Medina in the area of sex, suffered from an emotional aberration or delusion. Unless something seriously cut across or invaded that area, he was not violent, though effeminate. There had been no serious invasion of that area aboard the ship in the past—his being called "Rosina" in a

joking way not being considered serious by either him or the others. Thus his homicidal tendency had not appeared. But the charge against him of homosexual acts, whether true or false, did invade, and seriously, this very area of his delusion or aberration. This serious invasion of his delusional area made him the equivalent of a "homicidal paranoiac", which the *Keen* case finds to be inherently dangerous to the ship. The ship was thus rendered unseaworthy, in that Medina was not "equal in disposition * * * to the ordinary men in the calling".

Thus, since, under the *Keen* case, Medina's character made the ship unseaworthy, to Thompson's damage, Thompson is entitled to recover, unless such recovery is barred by his execution of the release, alluded to above.

The Release

We must here bear in mind that seamen are more carefully protected by the courts in their rights than are the ordinary run of mankind. As far back as 1823 it has been the law in this country that

> "Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached. But courts of maritime law have been in the constant habit of extending toward them a peculiar protecting favor and guardianship. They are emphatically the wards of admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians and cestuis

> que trust with their trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transactions is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable." Harden v. Gordon, Fed. Cases 6047.

In short, the burden is on the ship owner to show that the release was "fairly made with, and fully comprehended by, the seaman", *Garrett* v. *Moore-McCormack*, 317 U. S. 239 (1942). How can it be claimed that, as to a seaman, a settlement is fairly arrived at, when the ship owner, though innocently, misrepresents both the facts and the law to the seaman, and, by claiming he is practically well, impliedly urges the seaman to settle for an inadequate sum, all this at a time when that seaman lacks his own advisors on either the facts or the law? In short, it would appear that, as to this matter of Thompson's neuropsychiatric syndrome, or anxiety complex, admittedly real, but a difficult thing at best to either diagnose or prognose, both Dr. Farr and the Stapleton Hospital were much mistaken as to its future effects and continued existence. Had defendant not advised Thompson of Dr. Farr's report or insisted that it was right, and that he was practically a well man, that would have been one thing. For then Thompson would presumably have acted

upon the basis of his own judgment alone, not as influenced by the mistaken viewpoint and technical information of defendant. Or, had Thompson himself been properly represented legally, with his own medical advices on which to rely, then, even though defendant urged the correctness of its views, Thompson would have presumably settled upon the basis of his own considered and properly advised judgment. Under either of the above circumstances, the release would doubtless bind, as being "fairly arrived at". *Bonici* v. *Standard Oil,* (2 Cir. 1939) 103 F. 2d 437; *Sitchon* v. *American Export Lines,* (2 Cir. 1940) F. 2d 830. But here, to the contrary, not only did Thompson not have the aid of any legal and medical advices of his own, but the defendant, which did have that aid, insisted that its advices were correct, and in essence urged Thompson to settle for an amount now shown to be clearly inadequate, when it turns out that defendant's representations to Thompson as to his condition were, in fact, incorrect. Thus this seaman, in the same inferior position as a ward in dealing with his guardian, was induced to settle for an inadequate sum by the incorrect representations of the other party, in a superior position to him. Such a settlement certainly is not "fairly arrived at". Nor are *McGraw* v. *States S. S. Co.,* (N. D. Calif. S. D. 1953) 116 F. S. 446 and *Wilson* v. *McCormick S. S. Co.,* 1940 A. M. C. 1004 (State of California) to the contrary. For in *McGraw,* the Court's opinion states that the ship owner "was in no better position to determine the clinical or medical facts than was libellant". And in *Wilson,* the opinion says "The record is totally bereft of any evidence that the appellant steamship company, or its representatives, did anything either to urge respondent (seaman) to enter into negotiations for a settlement or to induce him to sign the release * * *." In the case at bar, on the contrary, the ship owner was in a better position to

determine the medical facts due to the report of its own medical expert, Dr. Farr. And it is clear that defendant's agent, in insisting that Thompson was practically well did induce Thompson to sign the release for the inadequate sum. The release accordingly is no bar, though of course, the $4,000.00 paid thereon must be credited upon any award of damages made by this Court.

Turning to the question of damages, we find that Thompson, as a result of the fact that defendant's ship was unseaworthy, suffered actual, and permanent brain damage. As a result (1) Thompson is no longer able to act regularly as a cook, with a petty officer's rating, a real loss in prestige and accommodations at sea, (2) he suffers a substantial pay loss, (3) he suffers, and will suffer, severe headaches and other unusual pains in his head off and on for the rest of his life, and (4) he has a neuropsychiatric condition or anxiety complex which renders him restless and dissatisfied with himself, no matter where he is or what he does.

It is true that one with an anxiety neurosis is apt to over-state, if not over-feel, the effects of this brain damage. Of course, his over-statements must be discounted, but not so his over-feeling. This latter defendant's own doctor testified was not sham, but real. It is, of course, also true, as the hospital records show, and Thompson admitted that he had suffered from certain other diseases, which doubtless had a substantial effect upon this anxity syndrome, in that they directly bore on certain of his hospitalizations and operations, if not on the brain damage itself. So we must consider the above symptoms of Thompson only to the extent that Medina's attack on him aggravated these symptoms.

However, bearing all these elements in mind, and the fact that Thompson is some sixty-three years old, and

giving credit to defendant for the $4,000.00 already paid in connection with the release, the Court would feel that the additional amount of $16,000.00 would fairly compensate Thompson for his out-of-pocket loss, his pain and suffering and permanent disability caused him by the above unseaworthy condition of defendant's vessel.

The facts herein stated and the conclusions of law herein expressed shall be considered the findings of fact and the conclusions of law required by F. R. C. P. 52.

Judgment may be entered accordingly.

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Name	Direct	Cross	Redirect	Recross
(For Plaintiff:)				
William Thompson	54a			
Harold M. Somberg, M.D.	120a	135a	152a	
(For Defendant:)				
Charles E. Farr, M.D.	156a	166a		
(For Plaintiff:)				
William Thompson (resumed)	180a	183a	228a	

Motion to dismiss complaint	249a
(For Defendant:)	
Vincent F. Barron (Direct 257a, Cross 262a, Redirect 274a)	
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P-2	Hospital records re William Thompson	314a
P-3	Medical report by Dr. Somberg re examination of William Thompson	329a
P-4	Medical record from Stapleton, S.I., Marine Hospital re William Thompson for period 2/16/54 and 2/23/54	332a
D-1	Employment record of William Thompson from U.S. Coast Guard	334a
D-2	Correspondence between William Thompson and Sieling-Jarvis	338a
D-5	Release signed by William Thompson	347a

12-2-52	Complaint and demand for trial by jury filed 12-1-52.
12-2-52	Summons issued.
12-2-52	Notice of Allocation filed. (Newark)
12-5-52	Summons returned served on 12-4-52, filed.
12-29-52	Answer filed.
2-9-53	Notice to take deposition of William Thompson, filed.
4-23-53	Ordered pre-trial conference adjourned until taking of deposition of William Thompson. (Hartshorne)
8-14-53	Notice of motion to strike out complaint and to grant judgment in favor of defendant, affidavit of mailing, filed. (ret. 9-14-53) (No brief submitted)
9-16-53	Affidavit in opposition to motion to dismiss,filed 9-14-53
9-16-53	Hearing on motion to strike out complaint for failure to submit to oral examination before trial. Ordered hearing continued to Dec. 14, 1953. (Hartshorne) (9-14-53)
12-8-53	Hearing on motion to strike out complaint for failure to submit to oral examination before trial. Ordered motion to be granted unless plaintiff submits to examination by Feb. 1, 1954. (Hartshorne) (12-7-53)
2-8-54	Pretrial Conference. (Hartshorne) (2-5-54) Ordered motion to amend complaint, granted. Ordered to be submitted. March 1, 1954 fixed as trial date.
2-8-54	Pretrial Order, filed 2-5-54 (Hartshorne) Notice mailed.
2-11-54	Defendant's interrogatories, filed.
2-15-54	Amended complaint filed.
3-1-54	Ordered motion to waive trial by Jury, granted. (Hartshorne) (2-26-54)
3-2-54	Trial without Jury before Hon. Richard Hartshorne: Trial adjourned to 3-2-54. (3-1-54)

3-4-54	Trial continued: (3-2-54) Trial adjourned to 3-3-54.
3-4-54	Trial continued: (3-3-54) Hearing on motion to dismiss complaint. Decision reserved. Decision reserved.
3-12-54	Opinion filed 3-11-54 (Hartshorne)
3-16-54	Judgment in favor of the plaintiff, William Thompson and against the defendant Coastal Oil Company, in the sum of $16,000.00 and costs, filed. (Hartshorne) Notice mailed.
3-23-54	Notice of taxation and verified bill of costs, filed 3-19-54
3-23-54	Statement of taxation of costs in the sum of $157.70, filed.
3-23-54	Notice of Appeal, filed 3-22-54.
3-23-54	Copies forwarded to Clerk, USCA and Elmer C. Miller, Esq.
4-20-54	Answer to amended complaint filed 4-19-54
4-20-54	Record on Appeal sent to U.S.C.A.
4-22-54	Notice re contents of appellant's appendix, filed.
4-22-54	Supplemental Record of Appeal forwarded to USCA.
4-23-54	Answers to interrogatories, filed.
4-26-54	Transcript of Testimony, filed.
4-26-54	Second Supplemental Record of Appeal forwarded to USCA

COMPLAINT

Plaintiff demands
a jury trial

ACTION UNDER SPECIAL RULE FOR
SEAMEN TO SUE WITHOUT SECURITY
OR PREPAYMENT OF FEES.

Plaintiff, by his attorney, Elmer C. Miller, complaining of the defendant, alleges upon information and belief:

First: That this Court has jurisdiction of the herein cause under the provisions of Section 33 of the Merchant Marine Act of June 5, 1920, 41 Stat. 1007, 76 USC Sec. 688, known as the Jones Act, and under the General Maritime Law.

Second: That at all times hereinafter mentioned plaintiff was and still is a citizen of the United States and a resident of the State of New York.

Third: That at all times hereinafter mentioned, defendant was and still is a United States corporation, with a place of business at 744 Broad Street, Newark, N. J.

Fourth: That at all times hereinafter mentioned defendant owned, managed, controlled and operated the vessel S.S. "ROSINA MARRON".

Fifth: That plaintiff signed articles on the S.S. "ROSINA MARRON" as second cook, at the Port of Marcus Hook, Pennsylvania, on or about December 1, 1949, at a monthly wage of over $300.00, and was discharged from said employment on or about January 13, 1950, at Corpus Christi, Texas, as a result of injuries hereinafter described.

Sixth: That without any fault on the part of plaintiff and wholly and solely by reason of negligence and carelessness of defendants, their officers, agents, servants and employees, in that a man known to be or who should have been known to be of dangerous, vicious, abnormal, immoral and depraved character and propensities, was employed on board of said S.S. "ROSINA MARRON", plaintiff was assaulted and seriously injured by the latter mentioned individual as hereinafter described.

Seventh: That on or about the 13th day of January of 1950, plaintiff had reported the above mentioned individual, who served on board as crew messman, named Metina, age 21, of Cuban nationality, for having witnessed him engaged in the forecastle in a homosexual act with two other crew members; and that in the evening of the same day the said Metina ambushed plaintiff on board and fell upon him from the rear dealing him several blows upon the head with a meat cleaver, causing him several skull fractures.

Eighth: That as a result of the assault and injuries plaintiff suffered the above mentioned skull fractures as a consequence whereof, and despite the original medical prognosis to the contrary, plaintiff has been and still is suffering from severe headaches and other symptoms which indicate a serious brain injury, not anticipated during the first treatment, and that plaintiff for these reasons has had continuing and increasing difficulty in working and in holding jobs.

Ninth: That by reason, and as a direct result of said assault, plaintiff thus sustained the aforementioned skull fractures with

injury to the brain, as well as great pain, suffering, loss of earnings expenses and medical care, all to his damage in the amount of One Hundred Thousand ($100,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of One Hundred Thousand ($100,000.00) Dollars, together with the costs and disbursements in this action.

/s/ Elmer C. Miller

ELMER C. MILLER
Attorney for Plaintiff,
Office & P.O. Address
12 Glenview Road
North Caldwell, N.J.

Dated: New York, N.Y.
October 7, 1952

[Answer]

Defendant, by its attorney, Francis M. McInerney, answering the complaint of the plaintiff herein, respectfully alleges:

FIRST: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph marked "FIRST" of the complaint.

SECOND: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph marked "SECOND" of the complaint.

THIRD: Admits the allegations contained in paragraph marked "THIRD" of the complaint.

FOURTH: Admits the allegations contained in paragraph marked "FOURTH" of the complaint.

FIFTH: Defendant admits that the plaintiff was employed as a second cook aboard the S.S. ROSINA MARRON and was discharged on January 13, 1950, but except as so specifically admitted, denies each and every other allegation contained in paragraph marked "FIFTH" of the complaint.

SIXTH: Denies the allegations contained in paragraph marked "SIXTH" of the complaint.

SEVENTH: Denies the allegations contained in paragraph marked "SEVENTH" of the complaint.

EIGHTH: Denies information and belief as to the allegations contained in paragraph marked "EIGHTH" of the complaint.

NINTH: Denies the allegations contained in paragraph marked "NINTH" of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

TENTH: That all the times mentioned in the complaint herein, the occupation or employment of the plaintiff had certain risks ordinarily and normally incident thereto which were obvious and well-known to the plaintiff, and in accepting, undertaking and continuing in such occupation or employment, the plaintiff assumed all of the said risks and whatever injuries plaintiff may have sustained as alleged in the complaint were sustained in the ordinary and normal course of plaintiff's occupation or employment.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

ELEVENTH: That whatever injuries plaintiff may have sustained at the time and place mentioned in the complaint, were caused in whole or in part or were contributed to by the negligence and fault and want of care on the part of the plaintiff, and the defendant pleads the contributory negligence of the plaintiff herein as a bar to any recovery herein by the plaintiff against the defendant.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

TWELFTH: That on June 2, 1950 the plaintiff, for a fair and adequate consideration, and with full knowledge of the consequences of his act, entered into a general release discharging the defendant herein for all claims that said plaintiff might have against the defendant; and that said release was executed freely without deception or coercion.

WHEREFORE, defendant prays that the complaint be dismissed together with the costs and disbursements of this action.

FRANCIS M. McINERNY
Attorney for Defendant
Office and P.O. Address
No. 665 Newark Avenue
Jersey City 2, New Jersey

HANRAHAN & BRENNAN, of counsel
to the Attorney for Defendant
Office and P.O. Address
No. 67 Wall Street
New York 5, New York

INTERROGATORIES TO BE ADDRESSED TO THE PLAINTIFF TO BE ANSWERED BY HIM IN WRITING AND UNDER OATH:

FIRST: State the diagnosis of the injuries plaintiff allegedly sustained, indicating those which are claimed to be permanent.

SECOND: List the exact period of time that plaintiff claims to have been disabled for the said injuries.

THIRD: List the amount of lost wages claimed by plaintiff.

FOURTH: List the amount claimed for medical services, physicians services, nurses services and hospital services.

FIFTH: List the period for and the amount to which plaintiff claims to be entitled to maintenance and cure.

Dated: New York, New York
February 9, 1954.

Yours, etc.,

FRANCIS M. McINERNY
Attorney for Defendant
Office and P.O. Address
No. 665 Newark Avenue,
Jersey City 2, New Jersey

HANRAHAN & BRENNAN, of counsel
No. 67 Wall Street
New York 5, New York.

TO:

ELMER C. MILLER, ESQ.
Attorney for Plaintiff
12 Glenview Road
North Caldwell, N.J.

SILAS B. AXTELL, ESQ., of counsel
15 Moore Street
New York 4, New York.

AMENDED COMPLAINT

ACTION UNDER SPECIAL RULE FOR SEAMEN TO SUE WITHOUT SECURITY OR PREPAYMENT OF FEES.

Plaintiff, by his attorney, Elmer C. Miller, complaining of the defendant, alleges upon information and belief:

FIRST: That this Court has jurisdiction of the herein cause under the provisions of Section 33 of the Merchant Marine Act of June 5, 1920, 41 Stat. 1007, 46 U.S.C.A. Sec. 688, known as the Jones Act, and under the General Maritime Law.

SECOND: That at all times hereinafter mentioned plaintiff was and still is a citizen of the United States and a resident of the State of New York.

THIRD: That at all times hereinafter mentioned, defendant was and still is a United States corporation, with a place of business at 744 Broad Street, Newark, N. J.

FOURTH: That at all times hereinafter mentioned defendant owned, managed, controlled and operated the vessel S.S. "ROSINA MARRON."

FIFTH: That plaintiff signed articles on the S.S. "ROSINA MARRON" as second cook, at the Port of Marcus Hook, Pennsylvania, on or about December 1, 1949, at a monthly wage of over $300.00 and was discharged from said employment on or about January 13, 1950, at Corpus Christi, Texas, as a result of injuries hereinafter described.

SIXTH: That without any fault on the part of plaintiff and wholly and solely by reason of negligence and carelessness of defendant, its officers, agents, servants and/or employees, in that a man known to be or who should have been known to be of dangerous, vicious, abnormal, immoral and depraved character and propensities, was employed on board the said S.S. "ROSINA MARRON", plaintiff was assaulted and seriously injured by the latter mentioned individual as hereinafter described.

SEVENTH: That on or about the 13th day of January of 1950, plaintiff had reported the above mentioned individual, who served on board as crew messman, named Medina, aged 21, of Cuban nationality, for having witnessed him engaged in the forecastle in a homosexual act with two other crew members; and that in the evening of the same day the said Medina ambushed plaintiff on board and fell upon him from the rear dealing him several blows upon the head with a meat cleaver, causing him several skull fractures.

EIGHTH: That as a result of the assault and injuries plaintiff suffered the above mentioned skull fractures as a consequence whereof, and despite the original medical prognosis to the contrary, plaintiff has been and still is suffering from severe headaches and other symptoms which indicate a serious brain injury, not anticipated during the first treatment, and that plaintiff for these reasons has had continuing and increasing difficulty in working and in holding jobs.

NINTH: That the said assault and resulting injuries and damages to plaintiff were the direct result of the negligence of the

defendant and the officers of said vessel, its agents, servants and/or employees, in failing to provide the plaintiff with a safe place to perform his duties; in failing to maintain proper discipline amongst the crew and allowing and permitting the assailant to become a crew member of said vessel, thereby subjecting the crew members and personnel on the vessel to unwarranted danger; and failing to provide the plaintiff protection from the assailant; and in failing to provide and maintain proper dicipline amongst the crew, all of which rendered said ship unseaworthy; and the defendant, its agents, officers, servants and/or employees were put on actual notice by the plaintiff herein of the character and conduct of the plaintiff's assailant.

TENTH: That by reason and as a direct result of said assault and the said negligence of the defendant, its agents, officers, servants and/or employees, plaintiff sustained the aforementioned skull fractures with injury to the brain, as well as great pain, suffering, loss of earnings, expenses and medical care, all to his damage in the amount of One Hundred Thousand ($100,000.00) Dollars.

AS AND FOR A SECOND AND SEPARATE CAUSE OF ACTION

ELEVENTH: Plaintiff repeats, reiterates and realleges each and every allegation hereinabove set forth, with the same force and effect as if herein fully set forth at length.

TWELFTH: That plaintiff's aforementioned injuries and damages were not caused by negligence or want of care on his part but by reason of the unseaworthiness of the vessel and her personnel in amongst other things permitting and allowing a seaman to be and

remain upon the vessel, namely the assailant, who was afflicted with a sexual and mental aberration of such a nature as to render him not equal in disposition and seamanship to the ordinary man in the calling and not competent to meet the ordinary contingencies of the seafaring life, with the result that he was of a vicious temperament and propensities which resulted in a vicious and unprovoked attack upon the plaintiff with a meat cleaver, an extremely dangerous weapon.

THIRTEENTH: That the said sexual and mental aberrations of assailant, Medina, were well known or should have been known to the defendant and officers of the vessel as were the vicious tendencies that were inherent in a person with such aberrations.

FOURTEENTH: That in addition to the aforesaid the plaintiff's assailant, Medina, was of a vicious and quarrelsome, savage, uncontrolable disposition, which fact was well known or should have been known to the defendant and the officers of the vessel.

FIFTEENTH: That the aforesaid sexual and mental aberrations of the said assailant, Medina, as well as his vicious, quarrelsome, savage, uncontrolable disposition, rendered him a danger to men who worked on the same ship, which fact was well known or should have been known to the defendant and the officers of the vessel, and the same rendered the vessel unseaworthy.

SIXTEENTH: That as a result of the foregoing unseaworthiness of said vessel plaintiff was caused to be injured, resulting in the aforementioned injuries and damages, as well as pain, suffering, and medical care, all to his damage in the amount of One Hundred

Thousand ($100,000.00) Dollars.

AS AND FOR A THIRD AND SEPARATE CAUSE OF ACTION

SEVENTEENTH: Plaintiff repeats, reiterates and realleges each and every allegation hereinabove set forth, with the same force and effect as if herein fully set forth at length.

EIGHTEENTH: That upon information and belief, plaintiff having become injured and ill as aforesaid, it was the duty of the defendant herein to furnish the plaintiff with prompt medical care, attention and medicines and to pay for the expenses of the plaintiff's maintenance and cure, and to pay him wages to the end of the voyage and for a time thereafter, for all of which the defendant is obligated by General Maritime Law.

NINETEENTH: That the defendant has failed, neglected and refused to pay to the plaintiff all of the wages, maintenance and cure hereinabove referred to while the plaintiff has been incapacitated, and upon information and belief, that the plaintiff has been and will be incapacitated for a long period of time, and as a result thereof, the sum which the defendant is obligated to pay to the plaintiff therefore, upon information and belief amounts to Twenty Thousand ($20,000.00) Dollars, no part of which has been paid although duly demanded.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of One Hundred Thousand ($100,000.00) Dollars on his first and second causes of action and Twenty Thousand ($20,000.00) Dollars on his third cause of action, making in all a total sum of One Hundred and Twenty Thousand ($120,000.00) Dollars, together with

the costs and disbursements in this action.

/s/ Silas B. Axtell

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SILAS BLAKE AXTELL
Of counsel
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15 Moore Street
New York 4, N. Y.

O P I N I O N

HARTSHORNE, District Judge:

Does a pot-pourri of homosexuality and attempted murder create an unseaworthy ship? Such is the primary issue here presented, the other, the validity of a seaman's release.

Plaintiff Thompson, a colored cook, long at sea, signed on the S.S. "Rosina Marron", a tanker owned and operated by defendant. The vessel carried a complement of some forty men, including among them one Medina, a Cuban, as crew messman. Medina was definitely effeminate, a "queer", called "Rosina" or other feminine names by all aboard the ship, who at times was seen kissing other members of the crew. This was clearly not to the liking of Thompson, a big, clean-cut masculine individual, who neither smoked nor drank. But nothing outwardly had occurred between the two on their voyage from Marcus Hook, Pennsylvania, to Corpus Christi, Texas, in January 1950, save some words when Medina repeatedly gave Thompson the crew's "short orders" in Spanish, which Thompson could not understand, as he had repeatedly advised Medina.

The testimony further indicates that one Pittaway, to whose room Medina constantly resorted after evening chow, had been given a wrist watch by Medina and was apparently a favorite of his. Thompson, who was fond of cards, was accustomed also to go to Pittaway's room, shared with one Schopf, to get Pittaway and Medina, and perhaps others, to play cards with him, later in the evening. The night of January 12, 1950 Thompson went to Medina's room or "fo'c'sle", found the door not open as usual, but closed, and on entry says he found Medina and Pittaway, and Schopf, as well, engaged in a homosexual act. Neither Medina nor Pittaway testified. Schopf denied such acts himself, and also on the part of the other two. But Schopf does admit that when Thompson entered, he said to Thompson that "it was a good thing you came." So the innate tendencies of Medina were obviously finding an outlet at that time, at least with Pittaway.

In any event, it is clear that Thompson promptly stated what he had seen, both to his superior, the Chief Steward, Schiffers, and to their Union delegate, Kaplus. So the Union delegate called a meeting of all concerned, to decide whether to report the matter to the Coast Guard, or to have it settled then and there at the Union meeting, as to whether Medina should be compelled to leave the ship.

But this Medina refused to do, going into no details, but simply making a flat denial of the charge, and leaving the meeting. However, he did not leave till after one of those present had called Thompson's attention to the fact that he, Thompson, was the only one to support and make the charge to the Coast Guard against Medina and

the others.

A few minutes later the meeting broke up, the rest leaving more or less together. Suddenly, as Thompson, in the darkness, turned a corner on the boat deck, he was struck on the head from behind three times, by what afterwards turned out to be his own heavy meat cleaver, and Medina's high-pitched voice cried "I'm going to kill you." Were it not for the fact that Thompson's skull was much thicker than ordinary, as the doctors testified, this intent of Medina would undoubtedly have succeeded. As it was, Thompson's thick skull was cut through both tables. He was promptly given first aid, taken to his stateroom in critical condition, with unconsciousness for an uncertain period, lifted ashore at Corpus Christi and taken to the hospital there, on landing the next day. A short time after the vessel docked, the Coast Guard saw him but briefly in his then critical condition, and made a report on the situation, but apparently interviewed the other witnesses but casually, though objections to the introduction of the report in evidence were withdrawn toward the close of the trial. However, both for the above reason and because the truth as to Medina's homosexuality with Pittaway is relatively unimportant, as shown later, this report is of little moment. Medina was ultimately tried and convicted on the murderous assault charge, the homosexual angle of the matter apparently not being moved under the circumstances. Meanwhile, Thompson was moved from the Corpus Christi Hospital to the New Orleans Hospital, as well as to others, and later to that at Stapleton, Staten Island, at the latter of which he received both

in-patient and out-patient treatment, the latter still continuing to the present day.

Thompson still claims to be suffering from severe pains in the right side of his head, the site of the injury, down through the side of his face and ear, with hot and cold spells there, severe headaches, and a peculiar restless and dissatisfied urge, which drives him continually, to get away from himself, and from whatever he is doing to something else. In April 1950, when he was first discharged from the U. S. Marine Hospital at Stapleton, the diagnosis was "encephalopathy due to trauma", i.e., brain damage due to a blow, and the medical testimony indicates the above symptoms are all typical of that condition. True, he had had certain diseases, such as lues, duodenal ulcer, etc., all of which might have had a bearing on his neuropsychiatric condition, but the testimony clearly indicates the major cause of his neuropsychiatric condition to have been the fractures of his skull by the meat cleaver in the hands of Medina.

Meanwhile, shortly after his first discharge from Stapleton, April 28, 1950, he went to one Barron, of the Ship Owners Claim Bureau, representing defendant, to get settlement moneys on his case, having refused the importunities of a series of lawyers who sought to represent him. Meanwhile, Barron, or another agent of the defendant, had had Thompson examined by their Dr. Farr, who reported that Thompson then, in May 1950, would be able to return to work in three months, and had but a 10% permanent disability. This was in fact somewhat similar to the prognosis then made by the hospital

itself, which was for a "good" recovery, and that he would be fit for duty May 29th. But that both Dr. Farr and the hospital were incorrect in their prognoses as to the length and amount of Thompson's mental and neuropsychiatric disability appears quite clear. For instance, not three months, but a year, later, we find him again confined in the Stapleton Hospital, where, among the treatment of other disconnected conditions, we find he had a "neuropsychiatric consultation", and a year after that, at the New Orleans Hospital, he was diagnozed, among other conditions, as having a "schizophrenic reaction." Finally, now, three and one-half years after Dr. Farr's examination, Thompson is still receiving out-patient treatment at the Stapleton Marine Hospital, where they recently gave him a head X-ray, obviously in order to ascertain any objective basis for his neuropsychiatric complaints. While the X-ray was negative, Dr. Farr himself admits these complaints are real, not sham. Furthermore, the undisputed testimony shows that Thompson cannot serve in his old position as cook, since the heat of the stove so seriously affects the pains in his head, and that he now is acting as a utility or mess man. Not only is this a job of lower rating than cook, but it of course carries substantially lower pay.

In any event, at Thompson's settlement conferences with Barron, the latter, or defendant's other agent, told Thompson of this prognosis of Dr. Farr, now found to be incorrect, and Barron refused to consider any greater settlement figure than $4,000.00 because he insisted to Thompson that Thompson was practically well then.

Barron admits that if he had then known that Dr. Farr's prognosis was incorrect and that Thompson's future would be as serious as it has now turned out to be, he would not have evaluated his case at $4,000.00, but would have told Thompson to get a lawyer before he settled. Barron also told Thompson he thought he had a weak case on liability. For at that time the case of Keen v. Overseas Tankship Corp., (2 Cir. 1952) 194 F.2d 515, cert. den. 343 U.S. 966, had not been decided, and Barron thought that notice to defendant of Medina's alleged vicious character, a difficult thing to prove, was essential, in order to impose liability on the owner of the ship. But it is clear that this is not the law, and that a seaman can recover if hurt by unseaworthy personnel, in the same way that he can if he is hurt by unseaworthy materiel, and quite regardless of the shipowner's notice or negligence.

Thus, as a result of these incorrect, though not intentionally false, statements of both fact and law to Thompson, this man, unrepresented by counsel, and without any independent medical advices of his own, signed a full release of his rights for the sum of $4,000.00. Such are the facts in outline.

These facts were presented to this Court sitting without a jury, on waiver by both sides, upon a complaint (a) for negligence, under the Jones Act, (b) for unseaworthiness, (c) for maintenance and cure, though the last named cause of action is not pressed, under the circumstances. To this complaint defendant entered appropriate denials. We turn to the legal issues.

The recovery under the Jones Act, and derivatively under the Federal Employers' Liability Act[1] depends upon the negligence of the employer, and this, in turn, depends upon plaintiff's proving that defendant did not use reasonable care to provide plaintiff with a reasonably safe place to work, which caused his injury, in that he was subjected to working with a crew member - Medina - of a vicious disposition and not of a disposition equal to that of the ordinary member of a crew. Keen case, supra. To support such a cause of action, plaintiff must also show that defendant knew that Medina was either actually homosexual and dangerous, as distinguished from being merely effeminate, or, on the other hand, was otherwise vicious, in being willing to premeditatedly murder on provocation, as above. But since these elements of defendant's negligence and knowledge are not essential to recovery for unseaworthiness, and the quantum of damages in either aspect is much the same, we turn to the consideration of the case in the latter aspect.

Unseaworthiness

The Keen case, decided since the occurrences herein, in fact since the execution of the release herein, correctly holds that a vessel can be rendered unseaworthy either by defective materiel or personnel, provided the latter be shown to be not the "equal in disposition and seamanship to the ordinary men in the calling." Thus an

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1 Jones Act, 41 Stat. 1007, 46 U.S.C.A. 688
Federal Employers' Liability Act of April 22, 1908, 45 U.S. Code, Sections 51-59

owner would be liable "if he signs on a homicidal paranoic whose appearance does not betray his disposition." This case further makes clear the fact that, just as a latent defect in materiel, unknown to the shipowner, suffices to render a vessel unseaworthy, so personnel, defective under the above standard, renders a vessel unseaworthy, and the owner liable, even if such defect is latent and unknown to the owner. The question then is, whether, in fact, Medina was, while perhaps not "competent to meet all contingencies (nevertheless) equal in disposition and seamanship to the ordinary men in the calling."

Clearly Medina was outstandingly effeminate, and it may well be, as plaintiff claims, that such an outstandingly effeminate individual is actually a homosexual, though such homosexual acts be unknown. It may further be that such a homosexual, in fact, is inherently vicious, with murderous tendencies. But no proof has been offered to support such a claim, and this Court certainly cannot take judicial notice of any psychologic, or psychiatric, claim which is so esoteric.

On the other hand, it is clear that this outstandingly effeminate individual, when charged with having committed this homosexual act, did, when he found that but one man could support this charge, promptly and cunningly plan to murder that man. For hardly had he ascertained the fact that the lips of but one man could make that charge, when he left the meeting, specifically called to consider his case, secretly got the key to the galley where Thompson's meat cleaver was kept, hid it in his shirt, concealed himself in a dark

doorway by which he knew Thompson would shortly pass, and then, with the cry "I'm going to kill you", struck the owner of those lips in the head, not once, but thrice, with this heavy meat cleaver.

No more vicious crime can well be imagined. Nor was it one executed on the spur of the moment, but by plan and premeditation. To say that a man who was willing to do this was but of the character of the usual seaman is indeed a slander upon all who go to sea. Of course, they are a rough and ready lot, handy with their fists, and had Medina attacked Thompson with his fists, because of Thompson's charge, Medina might well be considered a fit companion for the others on the ship. But fisticuffs differ as widely as the sea itself from a planned murder with a meat cleaver.

Much testimony was taken, and much argument ensued, on the question of fact as to whether the above homosexual act of Medina did, or did not, occur. To this Court, this question seems largely immaterial. For it only goes to the particular species of provocation which induced Medina to plan and carry out the attempted murder of Thompson. If the homosexual act had been committed, then Thompson was making a true charge as to Medina. If, on the other hand, it had not been committed, then Thompson was making an untrue charge against Medina. But whether Medina was the more provoked by the making of a true charge or an untrue charge is immaterial. In any event, none but a man of truly vicious propensities would have attempted to murder the one making such a charge, whether true or untrue.

Looking at the matter from another angle, Medina, in the

area of sex, suffered from an emotional aberration or delusion. Unless something seriously cut across or invaded that area, he was not violent, though effeminate. There had been no serious invasion of that area aboard the ship in the past - his being called "Rosina" in a joking way not being considered serious by either him or the others. Thus his homicidal tendency had not appeared. But the charge against him of homosexual acts, whether true or false, did invade, and seriously, this very area of his delusion or aberration. This serious invasion of his delusional area made him the equivalent of a "homicidal paranoiac", which the Keen case finds to be inherently dangerous to the ship. The ship was thus rendered unseaworthy, in that Medina was not "equal in disposition * * * to the ordinary men in the calling."

Thus, since, under the Keen case, Medina's character made the ship unseaworthy, to Thompson's damage, Thompson is entitled to recover, unless such recovery is barred by his execution of the release, alluded to above.

The Release

We must here bear in mind that seamen are more carefully protected by the courts in their rights than are the ordinary run of mankind. As far back as 1823 it has been the law in this country that

> "Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel, because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached. But courts of maritime law have been in the constant

> habit of extending toward them a peculiar protecting favor and guardianship. They are emphatically the wards of admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians and cestuis que trust with their trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transactions is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable." Harden v. Gordon, Fed. Cases 6047.

In short, the burden is on the shipowner to show that the release was "fairly made with, and fully comprehended by, the seaman." Garrett v. Moore-McCormack, 317 U.S. 239 (1942). How can it be claimed that, as to a seaman, a settlement is fairly arrived at, when the shipowner, though innocently, misrepresents both the facts and the law to the seaman, and, by claiming he is practically well, impliedly urges the seaman to settle for an inadequate sum, all this at a time when that seaman lacks his own advisors on either the facts or the law? In short, it would appear that, as to this matter of Thompson's neuropsychiatric syndrome, or anxiety complex, aumittedly real, but a difficult thing at best to either diagnose or prognose, both Dr. Farr and the Stapleton Hospital were much mistaken as to its future effects and continued existence. Had defendant not advised Thompson of Dr.

Farr's report or insisted that it was right, and that he was practically a well man, that would have been one thing. For then Thompson would presumably have acted upon the basis of his own judgment alone, not as influenced by the mistaken viewpoint and technical information of defendant. Or, had Thompson himself been properly represented legally, with his own medical advices on which to rely, then, even though defendant urged the correctness of its views, Thompson would have presumably settled upon the basis of his own considered and properly advised judgment. Under either of the above circumstances, the release would doubtless bind, as being "fairly arrived at." Bonici v. Standard Oil, (2 Cir. 1939) 103 F.2d 437; Sitchon v. American Export Lines, (2 Cir. 1940) 113 F.2d 830. But here, to the contrary, not only did Thompson not have the aid of any legal and medical advices of his own, but the defendant, which did have that aid, insisted that its advices were correct, and in essence urged Thompson to settle for an amount now shown to be clearly inadequate, when it turns out that defendant's representations tc Thompson as to his condition were, in fact, incorrect. Thus this seaman, in the same inferior position as a ward in dealing with his guardian, was induced to settle for an inadequate sum by the incorrect representations of the other party, in a superior position to him. Such a settlement certainly is not "fairly arrived at." Nor are McGraw v. States S.S. Co., (N.D. Calif. S.D. 1953) 116 F.S. 446 and Wilson v. McCormick S.S. Co., 1940 A.M.C. 1004 (State of California) to the contrary. For in McGraw, the Court's opinion states that the shipowner "was in no

better position to determine the clinical or medical facts than was libellant." And in Wilson, the opinion says, "The record is totally bereft of any evidence that the appellant steamship company, or its representatives, did anything either to urge respondent (seaman) to enter into negotiations for a settlement or to induce him to sign the release * * * ." In the case at bar, on the contrary, the shipowner was in a better position to determine the medical facts due to the report of its own medical expert, Dr. Farr. And it is clear that defendant's agent, in insisting that Thompson was practically well, did induce Thompson to sign the release for the inadequate sum. The release accordingly is no bar, though, of course, the $4,000.00 paid thereon must be credited upon any award of damages made by this Court.

Turning to the question of damages, we find that Thompson, as a result of the fact that defendant's ship was unseaworthy, suffered actual, and permanent, brain damage. As a result (1) Thompson is no longer able to act regularly as a cook, with a petty officer's rating, a real loss in prestige and accommodations at sea, (2) he suffers a substantial pay loss, (3) he suffers, and will suffer, severe headaches and other unusual pains in his head off and on for the rest of his life, and (4) he has a neuropsych[illegible]ic condition or anxiety comple[illegible] which renders him restless and di[illegible]tisfied with himself, no matter where he is or what he does.

It is true that one with an anxiety neurosis is apt to overstate, if not over-feel, the effects of this brain damage. Of course,

his over-statements must be discounted, but not so his over-feeling. This latter defendant's own doctor testified was not sham, but real. It is, of course, also true, as the hospital records show, and Thompson admitted, that he had suffered from certain other diseases, which doubtless had a substantial effect upon this anxiety syndrome, in that they directly bore on certain of his hospitalizations and operations, if not on the brain damage itself. So we must consider the above symptoms of Thompson only to the extent that Medina's attack on him aggravated these symptoms.

However, bearing all these elements in mind, and the fact that Thompson is some sixty-three years old, and giving credit to defendant for the $4,000.00 already paid in connection with the release, the Court would feel that the additional amount of $16,000.00 would fairly compensate Thompson for his out-of-pocket loss, his pain and suffering and permanent disability caused him by the above unseaworthy condition of defendant's vessel.

The facts herein stated and the conclusions of la herein expressed shall be considered the findings of fact and the conclusions of law required by F.R.C.P. 52.

Judgment may be entered accordingly.

[Judgment]

The above entitled action having come to be heard before the Honorable Richard Hartshorne without a jury on March 1, 2, 3 and 4, 1954, and the plaintiff having appeared by Elmer C. Miller, Esq., by Silas B. Axtell, Esq., and John A. Gleason, Esq., and the defendant having appeared by Francis M. McInerny, Esq., by Michael E. Hanrahan, Esq., and after hearing both sides the Honorable Richard Hartshorne on March 11, 1954, having rendered a decision containing the findings of fact and conclusions of law.

IT IS HEREBY ORDERED AND ADJUDGED that judgment be entered in favor of the plaintiff in the sum of Sixteen thousand ($16,000.00) dollars, with costs.

Dated:

March 16, 1954.

/s/ Hartshorne
U.S.D.J.

[Notice of Appeal]

S I R S :

PLEASE TAKE NOTICE that the defendant, COASTAL OIL COMPANY, hereby appeals to the United States Court of Appeals for the Third Circuit from an opinion rendered by the Honorable Richard Hartshorne and filed on the 11th day of March, 1954, and from a judgment entered on the 19th day of March, 1954.

Dated: New York, New York

March 19, 1954

FRANCIS M. McINERNY
Attorney for Defendant
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HANRAHAN & BRENNAN, of counsel
to the Attorney for Defendant
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New York 5, New York

[Answer to Amended Complaint]

Defendant, by its attorneys, Hanrahan & Brennan, answering the amended complaint of the plaintiff herein, respectfully alleges:

ANSWERING THE ALLEGED FIRST CAUSE OF ACTION:

FIRST: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph marked "FIRST" of the amended complaint.

SECOND: Denies the allegation contained in paragraph marked "SECOND" of the amended complaint.

THIRD: Admits the allegations contained in paragraph marked "THIRD" of the amended complaint.

FOURTH: Admits the allegations contained in paragraph marked "FOURTH" of the amended complaint.

FIFTH: Denies the allegations contained in paragraph marked "FIFTH" of the amended complaint.

SIXTH: Denies the allegations contained in paragraph marked "SIXTH" of the amended complaint.

SEVENTH: Denies the allegations contained in paragraph marked "SEVENTH" of the amended complaint.

EIGHTH: Denies the allegations contained in paragraph marked "EIGHTH" of the amended complaint.

NINTH: Denies the allegations contained in paragraph marked "NINTH" of the amended complaint.

TENTH: Denies the allegations contained in paragraph marked "TENTH" of the amended complaint.

ANSWERING THE ALLEGED SECOND CAUSE OF ACTION:

ELEVENTH: Defendant here repeats and reiterates each and every allegation contained in paragraphs marked "FIRST" through "TENTH" of this Amended Answer with the same force and effect as if herein set forth at length.

TWELFTH: Denies the allegation contained in paragraph marked "TWELFTH" of the amended complaint.

THIRTEENTH: Denies the allegations contained in paragraph marked "THIRTEENTH" of the amended complaint.

FOURTEENTH: Denies the allegations contained in paragraph marked "FOURTEENTH" of the amended complaint.

FIFTEENTH: Denies the allegations contained in paragraph marked "FIFTEENTH" of the amended complaint.

SIXTEENTH: Denies the allegations contained in paragraph marked "SIXTEENTH" of the amended complaint.

ANSWERING THE ALLEGED THIRD CAUSE OF ACTION:

SEVENTEENTH: Defendant here repeats and reiterates each and every allegation contained in paragraphs marked "FIRST" through "SIXTEENTH" of this amended answer with the same force and effect as if herein set forth at length.

EIGHTEENTH: Denies the allegations contained in paragraph marked "EIGHTEENTH" of the amended complaint.

NINETEENTH: Denies the allegations contained in paragraph marked "NINETEENTH" of the amended complaint.

AND AS FOR A FIRST AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

TWENTIETH: That at all the times mentioned in the complaint herein the occupation or employment of the plaintiff had certain risks ordinarily and normally incident thereto which were obvious and well-known to the plaintiff and in accepting, undertaking and continuing in such occupation or employment, the plaintiff assumed all of the said risks and whatever injuries plaintiff may have sustained as alleged in the amended complaint were sustained in the ordinary and normal course of plaintiff's occupation or employment.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

TWENTY-FIRST: That whatever injuries plaintiff may have sustained at the time and place mentioned in the amended complaint were caused in whole or in part or were contributed to by the negligence and fault and want of care on the part of the plaintiff, and the defendant pleads the contributory negligence of the plaintiff herein as a bar to any recovery herein by the plaintiff

against the defendant.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

TWENTY-SECOND: That any injuries experienced by the plaintiff as alleged in the amended complaint were entirely due to his own misconduct and provocation.

WHEREFORE, defendant prays that the amended complaint be dismissed, together with the costs and disbursements of this action.

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Jersey City 2, New Jersey

HANRAHAN & BRENNAN, of counsel
No. 67 Wall Street
New York 5, New York.

ANSWERS TO INTERROGATORIES

Plaintiff for his answers to interrogatories propounded by the attorneys for defendant herein, on February 9, 1954, states as follows:

1. Plaintiff was struck three times on the right parietal region with a meat cleaver, sustaining two large lacerations of the scalp together with a fracture in the right parietal area.

He was unconscious for 20 to 30 minutes. He was treated at the Memorial Hospital in Corpus Christi, Texas, from January 15, 1950 to Feb. 10, 1950, during which time there was

persistent drainage from the scalp laceration and plaintiff complained constantly of right sided headaches. On February 11, 1950 he was admitted to the United States Public Health Hospital at New Orleans, Louisiana, and remained there until March 18, 1950. The fracture o the right parietal bone was verified by x-ray, and right sided weaknes involving arm and leg as well as hypesthesia over the right side of th body. At the time of discharge he suffered from headaches, dizzines and generalized irritability. He was admitted on April 9, 1950 where he remained until April 28, 1950. There an electroencephlogram revealed evidence of increased emotional tension. A lumbar puncture showed an elevated protein and some globulin.

Although plaintiff returned to work in August 1950 he has since the time of his assault steadily recurring intermittent episodes of pain in the right parietal region accompanied by hot and cold flashe with radiation into the face, head, and neck, considered as possible epilectic equivalents.

On February 16, 1951 he was admitted to Stapleton Marine Hospital and remained there until April 20, 1951 where in addition to the above cerebral manifestations he had precodrial pain and palpatation and urethritis, and a complete neurological examination revealed marked evidence of an anxiety state with depression.

He returned to work and in spite of continuous irritability and tenseness and persistent headaches continued working until February 13, 1952, when he was readmitted to Stapleton Marine Hospital, where a trans urethral resection was performed. While an outpatient

at this hospital in November of 1952 he experienced and complained of spells occuring three or more times a week consisting of warmth and pain associated with tearing of the right side of head and face. He was readmitted to the New Orleans Marine Hospital November 13, 1952, remaining there until Dec. 15, 1952, where a marked anxiety state and tenseness was noted. At present he continues to be depressed and listless. He has lost considerable weight during the last few months and experiences manifestations of hot and cold water running down his head. He has exquisite tenderness in the right parietal region and constant pain in his head. He is oriented as to time and place but appears extremely tense and apprehensive. Recent neurological examinations reveal a marked anxiety state and an organic disease of the brain with the possibility of an epilectic equivalent, all of which are diagnosed as the direct result of his traumatic experiece of January 1950.

2. Answered in paragraph numbered 1. above.

3. Lost wages from January 1950 until through August 1950, plus potential future loss.

4. Plaintiff claims no moneys for hospital or physicians or nurses services, as he was treated at marine hospitals. He did expend the sum of $40 for medicines.

5. Plaintiff claims maintenance and cure from January 1950 to August 1950, plus future maintenance and cure.

Dated, New York, New York
February 24, 1954.

Yours, etc.

Silas Blake Axtell
Attorney for Plaintiff

TRANSCRIPT OF REPORTER'S NOTES

Newark, New Jersey
March 1 to 3, 1954.

Before The Honorable RICHARD HARTSHORNE, U.S.D.J.

APPEARANCES:

SILAS B. AXTELL, Esq., of the New York Bar, for Plaintiff (Elmer C. Miller, Esq., Attorney.)

JOHN A. GLEASON, Esq., of the New York Bar of counsel for Plaintiff.

MICHAEL E. HANRAHAN, Esq., of the New York Bar, for Defendant (Francis M. McInerney, Esq., Attorney).

MARCH 1, 1954:

THE COURT: Counsel, we have had the pretrial, I have been favored by your briefs. I hardly think it (2) is necessary, therefore, for an opening unless counsel desire to do so.

MR. AXTELL: I would like to just briefly--I have turned over the trial of this case to Mr. Gleason, my associate. Mr. Gleason has had considerable maritime experience from the defendant's side and recently he has associated in my office. It happens that I have been on the seamen side since 1908 exclusively, beginning with service with the Legal Aid Society for eight years, and I had the opportunity to advise on the preparation of the law known as the La Follette Seamen's Act in 1915.

THE COURT: I know counsel's name.

MR. AXTELL: Now about this case: it appears that this plaintiff is around sixty years of age, a man of robust physique,

strong and vigorous, of good habits, not a smoker or a drinker, an experienced cook, and in our rank, I believe, of the steward's department. He made one trip or part of a trip on the steamship, the Rosina Marron of the Coastal Oil Company.

THE COURT: A regular tanker?

MR. AXTELL: Yes. The vessel owners are subsidiaries of Sieling and Jarvis, a well-known firm of steamship operators and brokers in New York. The case is here because it is a New Jersey corporation (3) and the vessel is operated from New Jersey.

On or about the 13th of January, some month or more after Thompson had joined the ship, he had been accustomed to play cards with the crew. He likes to play cards. He went down the alleyway and opened the door and saw something which resulted in his making a complaint to the crew delegates. There is a delegate for the deck department, for the steward department, and for the engine room department. These three men and perhaps another were present and called in the three men involved.

THE COURT: What was the complement of the vessel generally?

MR. AXTELL: About forty-two or forty-three men, I believe. These men all belong to one union called the National Maritime Union.

The last few years under collective bargaining as a part of our democratic system, men on ships have hired--not hired, have designated or elected representatives known as crew delegates who take

care of what the seamen call "beefs."

THE COURT: I understand.

MR. AXTELL: Complaints, and they attempted in this instance to discipline these men rather than call the matter to the attention of the United States (4) Coast Guard, which is the Government supervising agency for merchant seamen and officers. The Coast Guard has power to revoke licenses or suspend them. They usually--always have hearings before they take such action.

The man accused principally, a mess man, left the meeting stating he would not leave the ship. The purpose was to ha him off the ship, and apparently he got a key to the mess room whe meat cleavers and other culinary instruments were kept locked up. He got a cleaver and slipped it inside of his shirt and waited in a dark place until the meeting was over and when Thompson--he was a tall a man, I believe, as Thompson--when Thompson came around th corner he came down on the back of Thompson's head with a meat cleaver.

THE COURT: Where was this meeting, in the forecastle or the stern?

MR. AXTELL: It was in the crew's quarters somewhere.

THE COURT: I really don't know.

MR. AXTELL: In the stern, in the afterhouse. The quarters of the crew are always in the stern, of course, on tankers. Thompson collapsed bleeding profusely. The man, the offender, went forward and surrendered himself to the mate and master, I think,

carrying a cleaver with him. He was heard to have (5) said two days before, "I am going to kill that--", using a phrase that I won't repeat referring to Thompson.

Thompson was put in the hospital that day or maybe the next day after the occurrence at Corpus Christi, Texas, and there the criminal case against the offender was brought to trial but, due to some statement by the district attorney to the effect that the defendant had not taken the witness stand, a mistrial was granted, and before the next trial came up--

THE COURT: This was a trial in the Federal Court?

MR. AXTELL: Corpus Christi, Texas, yes. Before the second trial came up, he pleaded guilty. We endeavored to procure the identical meat cleaver but were unable to do so and perhaps, since the defendants owned it, they might perhaps have it, I don't know. We have a couple of other meat cleavers, one of which is a little smaller and the other is a little bigger than the one involved.

The skull of this man has been punctured and there is some pressure on the brain and some evidence of bony matter pressing. As to what suffering he endures, I presume he can tell us. He has a very serious condition, there is no doubt of it.

I read the memorandum submitted by Mr. Hanrahan (6) on the law as he sees it, and the facts as he has tried to develop them from his cross-examination of some witnesses that have been produced. One would get the impression that the employment of homosexuals upon our American merchant vessels is common. I have been to sea.

Three of my sons have been to sea.

THE COURT: And so have I.

MR. AXTELL: We say that it is not common, thank God. The Jones Act which was passed in 1920, making the Railway Servants' Act applicable by reference, was intended to make the employment of incompetent and improper persons aboard ship expensive and thus tend to eliminate it under the free enterprise system.

The great Judge Learned Hand had decided, however, a case in which the facts are similar to these in that a certain servant of the vessel, an employee, used a meat cleaver as an instrument to injure and maim another member of the crew. The law is, as I understand it, that this is not a mere act of negligence under the Maritime Law as amended by the Jones Act, but this is a fundamental breach of the warranty of seaworthiness that every ship owner since the time of the Phoenicians has had to give to the crew members that he engages.

In a case that I argued before the Supreme Court not long ago the question of whether the duty to (7) maintain a man injured in the service of his vessel permanently did not extend indefinitely as long as he lived as was the holding of these ancient laws -- They referred to the case of pirates, men defending ships against pirates, and Mr. Justice Jackson seemed to think that although this case--the Farrel Case--was one that occurred during the war and the man was in defense of his ship, yet there was no active assault upon the vessel at the moment, therefore, the man who was blinded could not be

maintained for life under that ancient rule. But here we have the application of the doctrine well established in the Serape Case by the Supreme Court of the United States that if a piece of metal which has been tested and is the proper size and age and whose origin comes from reputable sources suddenly breaks causing injuries as happens, the ship owner must respond in damages, and that doctrine has been applied in this case to the situation that arises when a member of the crew explodes in such a way that he is capable of taking deliberately a meat ax from a shop, as it was shown here, carry it in his bosom and wait in a dark place to murder a co-servant, that the ship is unseaworthy per se by reason of his existence on board. And, therefore, the issue in this case is simply, is the amount of four thousand dollars (8) adequate or should it be set aside.

You will find that the Third Circuit and the Supreme Court in one of its cases, the Jarrett Case, I believe it is, had passed on the question and the Circuit Court in the Second Circuit has passed on it in the Bonici Case, one of my own which originated in 1938. Two applications for review to the Supreme Court were denied in that case, and there the issue was simply this: did the plaintiff know at the time, at the executing of the release, that he was not cured, that he would require more treatment. Did he know that he still suffered a severe injury, and that, I think, is the issue here.'

Now, this is unusual but Mr. Thompson said to me in Court that he wanted to say something. I told him that I would ask your Honor if he might. I don't know what he wants to say. Does your

Honor want to?

THE COURT: Does it bear on the merits of the case? Of course, if it bears on the merits of the case, then we want to hear it here or under oath.

MR. AXTELL: He declined to tell me what he wanted to say, your Honor.

THE COURT: I must say I think, counsel, you should consult with your client and your client should tell you what he wants to say.

(9) MR. GLEASON: I know what he wants to say and I'll guide him by questions.

THE COURT: Does it go to the merits of the case?

MR. GLEASON: It does go to a certain amount to the merits of the case and he feels his verity and honesty have been challenged by counsel for the defendant. It can be quickly cleared up both for your Honor's benefit or for the benefit of counsel for the defendant.

THE COURT: You mean cleared up on the stand?

MR. GLEASON: Yes, sir.

THE COURT: I would think so.

(To the witness) Will you take the stand--wait just a moment, we have heard the opening from plaintiff, I think we should hear an opening from the defendant.

MR. HANRAHAN: I will be brief.

THE COURT: Mr. Axtell spoke of this test upon the

release as pertinent, being to the effect, did plaintiff know that he was not cured. Now what is the specific case that you think supports that proposition?

MR. AXTELL: I have it in our memorandum of law. It's the Bonici Case. It is a decision by (10) Judge Congler affirmed in the Circuit Court.

THE COURT: I remember you cited several. I wanted to know which one you thought bore particularly on that. Now, what does defendant say?

MR. HANRAHAN: We admit that this assault took place. We claim we are not liable on three grounds, (1) Medina was not a man of vicious propensities, (2) the feud was a personal thing provoked principally by Thompson's relentless persecution of this Medina because of his femaleness, and (3) we settled all our obligations by release.

Now, on the question of vicious propensities--

THE COURT: You're talking a little too fast. I was taking notes. Your first point was what?

MR. HANRAHAN: Medina was not a man of vicious propensities and consequently the Keen Case does not apply. I would like to elaborate on that further.

THE COURT: The second point was that it was a personal feud, and the third point was what?

MR. HANRAHAN: The release.

THE COURT: The release.

MR. HANRAHAN: The release, right. On the business of

vicious propensities this case was settled back in 1950, and I think we can agree that the law at (11) that time, as a result of a couple of cases, the Koehler versus Presque-Isle and Kyriskos versus Goulandris, they held that under the Jones Act, where the ship owner knew they had a man on board of a very vicious nature, had warnings of past performance, knew that this man had threatened other people and then he, in fact, does go out and hurt another member of the crew, the ship owner is liable because they were careless and negligent in not doing anything about this vicious man.

Now, that was law when this case was decided about a year ago. I would say roughly it was in this field quite a bit of dynamite, the Keen Case came down and the effect of the Keen Case was to say, if in fact the ship owner had a man on board of vicious propensities, whether or not he knew about him, it rendered that ship unseaworthy.

THE COURT: Knowledge was immaterial.

MR. HANRAHAN: Knowledge was immaterial. Now, with respect to this case you are going to hear an awful lot of accusations upon the part of counsel and some of these other members of the crew that Medina was a homosexual. He was a queer, he was a sodomist, but the only evidence here--after they say things like that, they all admit this whole assault came as a (12) tremendous surprise to them. Medina was on the ship six months before Thompson, he was effeminate. He spoke in a slightly high voice, some of the fellows say he wore perfume; other fellows say he was a little lavish with aftershave lotion.

THE COURT: Your point is what?

MR. HANRAHAN: He was queer but not vicious.

THE COURT: You say that effeminateness is not per se unseaworthiness?

MR. HANRAHAN: It is the vicious propensity that is the unseaworthiness.

THE COURT: Query whether viciousness and effeminacy necessarily go hand in hand.

MR. HANRAHAN: I think that is quite true because you see here one of the most damaging--well, if he is damaging to any extent--is the witness Schiffer, the chief steward, who testified on behalf of plaintiff.

Now, on cross-examining I took this fellow Schiffer and I get him to admit he has been running into queers as he goes--

THE COURT: You talk very fast and you slur a little bit and I don't hear you.

MR. HANRAHAN: He has been going to sea and you run into them and if you leave them alone they don't bother you. He admits particularly in sea occupations you get all sorts of cross sections.

(13) Now with regard to the second phase of the provocation of the persecution of Thompson and Medina, you have this man on the ship six months before he joins. There were only three colored men on the ship. I think it's evident that Thompson resented a man of his own color having this effeminateness and being a--well, to some extent, ridiculed by the other members of the crew. They pat him and they

call him female names and so forth. I think that he gets so intense with this that this alleged homosexual act never took place. So that your Honor may anticipate, the only witness of any evidence of homosexuality, any alleged homosexuality, is Thompson. Now, he will accuse three men of participating in this unnatural act. You can imagine the trouble I had. I finally nailed one of these fellows, a young man out in Long Island. I took his testimony. He vehemently denies the whole thing.

THE COURT: Are all these depositions coming in by stipulation?

MR. HANRAHAN: Yes, sir, but I would like to hit the highlights so your Honor will know what to anticipate as we go along--if, in fact, Thompson saw such an act actually going on that he makes all (14) these reports to people and calls the union meeting about, why does he go and play cards with the fellows, the same fellows that he accuses in the game, Pettiway. Why does he only make complaints, union charges against Medina, if there were three men involved in this? Schopf says this was an innocent thing. The man was popular; he was always in card games; he would go ashore with various members of the crew and they would meet down in this particular forecastle every night where the alleged act took place. Schopf says if we were doing anything there would we have left the door unlocked. I mean, the natural thing if anybody is going to do a thing like that--he said, "I was sitting on my bed." This is Schopf's story.

"I was reading a magazine. Medina was sitting on the

bureau and Pittaway was lying in bed and they were joking and one fellow says something to the other and they start to wrestle just as Thompson comes in."

The Coast Guard investigated this thing. I have the report of the Coast Guard, whether your Honor will accept it. That is the unfounded provocation. I say that even normal people can, under relentless slander and persecution, be worked to a point where they commit assault or murder, and they are not necessarily a man of vicious propensities, not a man (15) who has shown a reputation for starting fights or beating up people or being a bully, a man, as the Court uses the phraseology in the Circuit Court in the Jones Case, a man of constant abuse, drunkenness, excessive drinking.

On the release--

THE COURT: Now then, let me stop you just a minute. My thinking may be quite wrong because this is naturally a matter for novel impression from all angles to me. This matter, this question of whether the assault--this question of whether the immoral act occurred or not, as I understand from your opening, only goes to the question of what the motive was for the admitted assault. Was the motive to get revenge for a man who falsely charged me with such an immoral act and was picking on me generally, or was it to get revenge against a man who charged me with being immoral--

MR. HANRAHAN: I think that is a good way of putting it.

THE COURT: --which I was--I mean, that is about all there is to it, as I see it. Now I'm just posing the question, isn't that

about it, don't both sides agree with that?

MR. GLEASON: Sir, I think it goes a little further than that. May I read you, your Honor, the (16) language of the Court of Appeals in Jones versus Lykes Brothers which was followed in the Keen Case, and in succinct language lays down a foundation for guidance, I think, of the trial judges from then on in these cases. It could not have been done for any reason other than that. The Court says this:

"The warranty is indeed unconditioned, that is the warranty of seaworthiness in regard to vicious seamen."

THE COURT: Personnel?

MR. GLEASON: Yes, sir, the warranty is indeed unconditional as is the warranty of the ship herself and her gear but it means, as we have said, not that a seaman is competent to meet all contingencies but that he is equal in disposition and seamanship to the ordinary men in the calling and I think, your Honor, that that probes the depth or challenges the trial judge to probe the depth of what is equal disposition, and in that regard, your Honor, I think you can well take cognizance of the rest of the testimony that is going to come out in this case by deposition that the--

THE COURT: What you say is that no ordinary seaman, whether he were falsely charged or truly charged, would use a meat cleaver to take revenge.

MR. GLEASON: Exactly, sir. And, sir, it is only those people who come into the category of (17) persons who are not equal

in disposition to ordinary men or the ordinary man of their calling that will do this, and your Honor has, of course, had a lot of experience in criminal matters and the thing that must have struck you--I know I have been, and on the other side of the Bar I have been a district attorney--and the fact that struck me and the thing that must needs have struck you is that man after man that comes before you charged with a deed of this kind has some quirk and that quirk very often is a quirk of a moral character as this man had; and, your Honor, if you are going to say as my--I mean if one says, as my adversary says, that these men who are aberrated sexually are merely a joke, then, your Honor, I will say this: that the seaman is not adequately protected because these men are not jokes.

Was it a joke, for instance, your Honor, as you will hear and will be disgusted at the testimony--but we must read it to you--

THE COURT: Now we must take facts as facts, we are not children.

MR. GLEASON: And when your Honor hears that this man would come into the seamen's mess and kiss seamen on the mouth while at mess--

THE COURT: The only thing that occurs to (18) me is perhaps we are summing up a bit in our opening.

MR. GLEASON: Yes, sir, that is so, but I want to clear up one thing, your Honor, and that is I think, in my opinion, this man--the unseaworthiness of this ship goes deeper than just the hitting on the head. I think that is sufficient, that no provocation is sufficient

to warrant the man taking a meat cleaver and hitting his brother seaman on the head to murder him but, your Honor, I think it goes a little past that. I think this man's unseamanship goes back of the deed that he did because he, even before he struck this man, he was unequal in disposition and they knew it for months, this whole vessel knew it and you will be--it will be read to you that the chief steward who admitted--

THE COURT: Yes, counsel, but you must have a causative effect of unseaworthiness upon the injury which you complain of. Now, there was no direct causative effect of effeminacy upon the man's broken head. The causative effect was the use of a meat cleaver.

MR. GLEASON: Yes, sir, but the use of a meat cleaver, I say, your Honor, that the use of a meat cleaver would be more likely--it would follow the personality and disposition of one of these aberrated (19) sexuals than it would the normal person.

THE COURT: That must be true. The only thing I was considering before we get to your release is the bearing of the defense's claim that this was a personal feud between the two and not a question of an immoral act in fact, and revenge because of making public of the immorality. I don't quite see how your claim goes as to the fact that it was simply a personal picking by Thompson on Medina. I don't see that has any bearing except as showing the provocation that existed for using of a meat cleaver, and the only bearing that I see of provocation for the use of the meat cleaver is as showing whether the man was different then the normal seaman, i.e.,

whether the normal seaman, even assuming the provocation to be as the defense claimed it a personal feud, would have sufficed to make the normal seaman pick up a meat cleaver and knock another man in the head. That seems to me--the point of your defense, and if it is not please tell me now.

MR. HANRAHAN: I say, if I understand your Honor correctly--I am trying to find out in my own mind whether it is just a question of different phraseology.

THE COURT: What is the point of your defense other than as showing the kind of provocation, (20) and, isn't the sole bearing of provocation the showing that Medina was or was not a normal seaman?

MR. HANRAHAN: No, I'm not introducing provocation in that light.

THE COURT: What is the bearing?

MR. HANRAHAN: I am introducing provocation to show that with provocation a man with Medina's effeminateness or a normal man could be provoked to such an extent as to wield a meat cleaver, and that this man's actual nature--

THE COURT: What you say is, then, that the normal seaman, if he had been picked on and if he had been falsely charged with being a homosexual, would have picked up a meat cleaver. That is just about what I said in other words.

MR. HANRAHAN: Yes.

THE COURT: All right. Now, I understand your claim.

MR. HANRAHAN: May I discuss the matter of the release?

THE COURT: Now go to the release.

MR. HANRAHAN: The leading case on releases goes back to about 1938, Garrett versus Moore-McCormack, and it cites the doctrine that the seaman is a ward of the Federal Court, and that the burden is on me--

(21) THE COURT: Let me interrupt you just a moment. Do you agree or disagree that one of the tests, at least as to the validity of a legal release, is whether the man who signed the release thought he was cured when he signed it?

MR. HANRAHAN: No.

THE COURT: You don't agree?

MR. HANRAHAN: No, just as long as he has adequate medical knowledge, adequate legal facilities, to know the full nature of his rights and full nature of his disability whether or not he is cured.

THE COURT: Supposing he doesn't know, in fact, whether he is cured and he has not been advised specifically whether he has been cured but he has available to him medical advice which would give him that information and he doesn't use it?

MR. HANRAHAN: I think that is his hard luck.

THE COURT: Do you think you can support that?

MR. HANRAHAN: Yes. May I just give you a little background of what entered into this--

THE COURT: Just a minute. What does plaintiff say to that?

MR. GLEASON: I beg your pardon.

(22) THE COURT: Do you agree?

MR. GLEASON: No, sir, I do not. I heartily disagree with that because it begs the question it is not logical, it begs the question and renders us thoughtless beings if we were to apply it because it doesn't sound in logic. I can very quickly show you that--

THE COURT: Then counsel are at odds as to the rule as to releases.

MR. HANRAHAN: Just let me give you some of the background. He was injured here, if you can recall these dates, your Honor, on January 13, and he went into Corpus Christi Marine Hospital.

THE COURT: Now let's not get into the facts yet. We have not proved even a fact. You tell me, defense, what you consider to be the rule on releases.

MR. HANRAHAN: I can read it to you from two cases.

THE COURT: You tell me in so far as pertinent to his case.

MR. HANRAHAN: The case of Amechi versus Standard Oil:

> "One who claims that a seaman has signed away his rights to what in law is his due must be prepared to take the burden of sustaining the release (23) as fairly made, fully comprehended. Nevertheless--"

THE COURT: What do you mean, "fully comprehended"? Do you mean comprehended that the paper is a release, or do you mean comprehend his physical and mental condition at the time he signs the paper?

MR. HANRAHAN: I read it further:

"Nevertheless a release fairly entered into and fairly safeguarding the rights of a seaman should be sustained. Any other result would be no kindness to the seaman for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regularly into Courts of Admiralty. Even if the seaman is the Court's ward the Court cannot always be at hand to watch over him for it can only move ponderously in form of a law suit. Fair settlements are in the interest of the man as well as the employer. This conclusion is substantiated by the fact that Congress, when it legislated as to the form of releases for wages, nevertheless did so on the basis that a release was good until set aside."

And then further distinguishing, Sitchon versus American Export Lines:

"If such a settlement as the one in the case at Bar is voidable, no release by a seaman could ever (24) be free from attack if he subsequently discovered that his injuries were greater than he anticipated when executing the release. When a seaman has made a settlement--"

THE COURT: What is the name of that case?

MR. HANRAHAN: Sitchon against American Export Lines, 113 Fed.(2) 830.

THE COURT: What circuit was that?

MR. HANRAHAN: I don't have that, your Honor.

THE COURT: Proceed.

MR. HANRAHAN: Quoting again:

"When a seaman has made a settlement after full investigation and with disinterested advice we can see no ground for holding it invalid. The question in any case is whether the seaman has intelligence enough to fully understand the situation and the risk he takes in giving up the right to prosecute his claim."

I think those cases pretty well sum it up. The seaman here did not have an attorney.

THE COURT: Let's not discuss the facts in the case except so far as you think it is necessary for me to understand the testimony as it goes in. Do you think so?

MR. HANRAHAN: I'll quit with that.

THE COURT: Proceed with the testimony. (25)

WILLIAM THOMPSON, called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GLEASON:

Q Mr. Thompson, just before Judge Hartshorne called us in to start the case you told me, did you not, that you wanted to tell Judge Hartshorne and counsel for the defendant, Mr. Hanrahan, or Halleran, as you call him--his name is Hanrahan by the way--you wanted to clear up something in regard to that bandage on your head, is that right, sir? A I do.

Q I want you to talk a little louder, sir. You did?

A Yes, I did.

Q Now, will you tell Judge Hartshorne and Mr. Hanrahan the circumstances under which that bandage, or the forerunner of that bandage, appeared on your head. I say forerunner because I was present when it was changed by the doctor who examined you for the defendant. Now, go ahead.

THE COURT: Sit right down.

THE WITNESS: There is nothing. I got to show you first this (handing).

MR. HANRAHAN: I would like to record a technical objection that the basis for questioning should be laid down first instead of starting off in the middle without any factual question.

(26) THE COURT: Now, this is a condition--conditioned on a theory with which we are presented. I would suggest first of all--sit down, won't you--that you two gentlemen first examine these exhibits and be sure and take care of them and then tell me if you have any objection to my examining them.

MR. GLEASON: Yes, sir.

Q I take it, Mr. Thompson, that these two bottles that you have handed the Judge are medicines that were given you lately at the Marine Hospital. Is that right, sir? A Yes.

THE COURT: What hospital was that?

A The clinic at the Stapleton, Staten Island, Hospital.

Q Now, I take it also that the papers that you have handed to the Judge are your Certificate of Discharge? A This is an

appointment.

Q An appointment card from the Surgical Outpatient Department of the Stapleton Marine Hospital and it is for an appointment for tomorrow for treatment, is that right? A Yes.

Q And also you have handed to the Judge a blood test report of Moore-McCormack Lines dated 1/8/1954. Is that right, sir? (27) A Yes.

MR. GLEASON: Do you wish to object to any of those?

MR. HANRAHAN: Of course. I mean they are prescriptions and nowhere on these records does it state what they are for or what they are supposed to do.

MR. GLEASON: I will question Mr. Thompson.

MR. HANRAHAN: I object to his competency.

THE COURT: Mr. Thompson, this man here is your lawyer. He knows how to handle these things. I think you can rely on him taking care of your rights. Now why don't you, since he knows you have these papers and bottles, put them in your pocket and he will call for them at the proper time. Don't you think that is wise?

THE WITNESS: I think so, Judge, you know best.

THE COURT: He knows best.

Q Now, Mr. Thompson, I'm going to put these in an envelope and I am going to give you back your medicine and we will proceed with the case and we will bring this question of this bandage up in its proper place, which will be a little time from now.

THE COURT: We have to go into everything in so far as it bears on your rights.

(28) THE WITNESS: Yes, sir.

THE COURT: You sit down and take it easy.

Q I was going to ask him to sit down and relax and keep your voice up, will you, sir? A I will try.

Q How old are you, Mr. Thompson?

A Last December the 25th I was sixty-two.

THE COURT: You were born on Christmas Day?

THE WITNESS: 1891, sir. I'll be in my sixty-third year now.

Q And I understand you are a widower, sir, is that right?

A Yes, I was married a long time and my wife is dead.

Q Where is your home, your present home address?

A Right now?

Q Yes, sir. A I am staying at 550 West 28th Street, the Seamen's House.

Q Have you recently been at sea? A Yes, sir, I have a discharge in. I joined the Uruguay on January 7, 1954, and was discharged February 15, 1954.

Q Now, sir, we will leave that for the present and go back to the Rosina Marron. Do you remember that vessel? A I do.

(29) Q Do you remember when you boarded her and where?

A I remember where I boarded her but I can't remember the date.

Q Well, sir, conceding or at least refreshing your memory

of the date of your accident as January 13, 1950, can you tell the Judge how long before that date you boarded her, approximately, sir, that is all we want?

THE COURT: Where did you sail from?

THE WITNESS: We sailed from Perth Amboy, New Jersey.

THE COURT: And you made no stop?

THE WITNESS: No stop, Judge.

THE COURT: You pulled in at Corpus Christi when?

THE WITNESS: This is the trip of the accident. We pulled into Corpus Christi, I think it was, January 16, 1950.

THE COURT: It took you about a week to go down, more or less?

THE WITNESS: Yes, just about six days.

Q Now, sir, when you boarded the Rosina Marron, do you remember Medina? A Yes, I remember him.

Q Was he already aboard? A He was aboard when I went there.

Q Do you know of your own knowledge whether he had (30) been aboard the vessel for some time before this trip? A He was.

Q Now will you describe Mr. Medina? First of all, tell us what his rating was and what his duties were.

THE COURT: Excuse me just a minute. Was this voyage down from Perth Amboy to Corpus Christi your first

voyage aboard the Rosina Marron?

THE WITNESS: No, Judge. I think this was my second or third voyage.

THE COURT: In any event, Medina had been a member of the crew before you became a member?

THE WITNESS: Before I was, yes.

THE COURT: All right.

Q And you had known Medina on previous voyages you had taken. Is that right, sir? A Yes.

Q Well, then, will you describe Mr. Medina? First of all tell us what his rating was. A His rating was crew's mess man.

Q What were the duties of a crew's mess man?

THE COURT: Well, they were to put on the mess.

Q In the crew's mess? A Three times a day.

Q Now, will you describe him for the benefit of the (31) Judge? A Describe Medina?

Q Yes, his height, his probable weight. A I would say his height was about five foot four inches, or something like that. I can't--that is as close as I can get, about five four, and his weight might be between 155 and 160.

Q I see. Now, sir, did he have any characteristics that made him stand out from other men? Did he have any characteristics that were different from other men? A He was entirely different from other men, other members of the crew.

Q Will you tell us in what respect he was so?

A Well, he more acted like a woman and most all the crew called him sweetheart, dearie and Rosina.

Q Did you hear other members of the crew call him that, sir? A Yes.

Q And was this during the two trips preceding the one or before the one in which you met with your injuries? A Well, I'll tell you. When I joined the ship there were two other colored men besides me. Medina was one and the chief cook was, which is a Puerto Rican. He is a colored man. Well, I was second cook, and the chief cook said to me, "Second," he said, "he is a she."

(32) Q He is a she? A He is a she. He is a woman. I didn't know that. That was my first morning in the galley when the chief cook mentioned that to me. Then Medina comes in the galley and I don't speak Spanish.

Q Well, aside from speaking Spanish, sir, leave that for the moment and we'll go to Medina's characteristics. Will you tell Judge Hartshorne--

THE COURT: Do you need to go into further details?

MR. GLEASON: I don't think so, your Honor.

THE COURT: Don't you both agree that the man was a homosexual?

MR. HANRAHAN: No, I say he was effeminate.

THE COURT: He was effeminate but not a homosexual?

MR. HANRAHAN: No, sir. I think that that is the

complaint, that he was guilty of a homosexual act and there is no evidence here anywhere. I can't agree to that conclusion.

MR. GLEASON: Shall I pursue it?

THE COURT: If you prefer to, yes.

Q Did you notice this man when he was serving the crew's mess? A When he served the meals in the mess room I can't (33) notice him because all the men got the dishes of food up from the galley and he take it in and I never follow them, I am always in the galley to dish the food.

Q Did you notice the way he walked? A Well, I'll tell you. Like I told you before, we all know Medina was like a woman. He talk, he walked, and his remarks; he called almost all the boys sweetheart and most all the boys called him sweetheart, and hugged and some of them kissed him.

Q Some of them kissed him? A Yes.

Q On the mouth? A Right on the mouth and on the jaw and he was always rouged up.

Q You saw that, sir? A I seen that rouge and lipstick.

Q He wore rouge? A At times.

Q And lipstick? A That's right.

Q Did he wear perfume? A He was always smelling.

Q Of perfume? A Yes.

Q When you say his actions were those of a woman, you (34) testify with knowledge, do you, that the average walk and motions

of a woman are different in their essence from men's, is that right, sir? A From men's.

Q Is that right, sir? In other words, there is more sway of the hips in moving, is that right, sir? A Well, that was his walk.

Q And there is a higher pitched voice. Did he have that? A Very soft.

Q A very soft voice? A Yes.

Q Did he talk in an effeminate manner, sir?

A He talked in an effeminate manner but when he is mad then he can holler out just like me talking now.

Q Did you see him mad at times, sir?

A Yes, he got mad at me, once.

Q And when was that? A This is what I want to explain: the chief cook is a Spanish man and he understands the breakfast, the lunch and the supper orders in Spanish, when Medina gave him them, but I don't.

Q In other words, you don't speak or understand Spanish?

A I don't, and in the morning when Medina comes in the galley for his eggs he would order in Spanish and all the (35) men order the breakfast eggs cooked. Then I can't understand and I say, "Medina, I don't speak Spanish. Why don't you give me the order in English?" And he speaks English. They give him the orders in English because I don't understand, because many times the chief cook got to tell me what he said. Then he get mad at me when I

tell him about it.

Q You mean Medina got mad at you? A He was continuously doing that and giving orders in Spanish and I ask the chief cook to talk to him because I don't understand Spanish.

Q Was this on the voyages before the one on which you were injured? A On all voyages.

Q Now, will you tell us when Medina got mad, what did he do? Tell the Judge just exactly how he acted. A When he get mad he would shake and twist himself and go on outside and when he come back in he would be cooled off a little.

Q In other words, did he show signs of hysterical behavior like a woman? A He was real mad and sweating.

MR. HANRAHAN: What does that mean? I would have to object to that as leading.

THE COURT: Sweating and shaking, that is what (36) his words were.

Q Sweating and shaking. A Yes.

Q Now, sir, was there any time except this that you were talking about about the eggs, was there any time that you had any personal feud with Medina, any personal fight, that is before the happening of your injury? A Well, we never had any personal fight or anything. Or when I tell you about the orders, that is meal orders for the men.

Q Just what you have told us and the Court. How many times did he get mad at you about these egg orders? A Most

every time when I said something to him he was always mad.

THE COURT: What would you be saying? Would you be talking to him about orders or what?

THE WITNESS: Well, I told him, I said, "Medina, you speak just as good English as I do and better than I do. Why don't you give me your orders in English instead of Spanish? You know I can't speak Spanish." And then he go way and blah, blah, blah, and I can't understand him, and the chief cook said, "You better give him your order in English because he don't understand," because I have got to cook these orders while the chief cook take care of the lunch.

(37) Q In other words, you are the short-order cook for breakfast. A I am the breakfast cook.

Q And the eggs must be done as ordered?

A That's right.

Q You mean by that one side over or two eggs?

A Straight up, over, easy, and scrambled or something like that.

Q Now sir, did you ever, during this time that you are telling us about on these former voyages, did you ever shout at him or anything like that? A At Medina?

Q Yes. A Yes, I do.

Q When was that? A About the same breakfast order.

Q In other words, you told him to give his order in English? A Yes, and I think this might happen once or twice.

We were playing cards and something happened. I bet Medina out of a pot and he got mad.

Q What did he do? A Well, he got mad because he lost and he was talking Spanish and shaking.

Q Shaking? (38) A Yes.

Q Was he sweating again? A He was always sweating and shaking when he get mad.

Q Was that shaking a visible shaking? A I can't just--like I want to say because I don't understand. When he gets mad he was always talking (indicating), because I don't understand what he is saying.

Q You didn't understand Spanish that he was saying? A No.

Q Would he have his fists closed? I notice as you sat on the stand you put your arms akimbo. A That is the way he would do.

Q And you closed your fists and shook your arm. Is that the way he would do? A That is the way he done when he would get mad.

Q And you noticed this not only when you asked him to speak to you in English in the short-order kitchen but you also noticed it at the card game? A Yes.

THE COURT: Who won this card game?

THE WITNESS: I won that.

THE COURT: You won it.

Q Were you ever there when he lost to somebody else?

A Yes.

THE COURT: Did he get mad at that other person?

(39) THE WITNESS: No. Judge, to make this plain, he never get mad unless it is a big pot and he thought he had the best hand and--

THE COURT: You were playing poker?

THE WITNESS: Playing poker and rummy because he would knock with five and I had four, and if we playing for five dollars he has got to pay me then.

THE COURT: This was a big pot that he lost to you and that was the occasion that he got mad?

THE WITNESS: Yes.

THE COURT: You don't remember him losing a big pot to anybody else?

THE WITNESS: No, I can't recall it.

THE COURT: All right.

Q Now, sir, when would these card games take place as a rule aboard ship, at what time? A Will you give me a little chance because I don't want to say anything that will reflect back. I want to remember good what happened.

Q I mean time of day, sir. Would they be in the morning, during the day or in the evening? A It's about 7:15, between six, I mean, between 6:15 and 6:30 in the evening.

Q It is true, isn't it, Mr. Thompson, that aboard vessels--

this is for the purpose of the record, Judge--(40) aboard vessels you eat your supper very early, don't you, sir? A At five o'clock, at sea.

THE COURT: You played your cards right after chow?

THE WITNESS: Right after chow, Judge, as you said.

Q Did these games go on most every evening as relaxation? A Yes.

Q Now, sir, bringing you down to the night or the evening that you went into the cabin to get some men to play poker, do you remember that night? A I remember.

Q That was the night before your injury, wasn't it, Mr. Thompson? A Yes.

Q Now will you tell the Judge just exactly what you did from the time of your chow when you got up from the table. Trace your actions from that time on, please, sir, in detail.

A Well, I must tell you from the beginning, Judge, because I don't want to leave anything out. When I join the ship I likes to gamble, I like to play cards as well as most all seamen, that is their game.

THE COURT: African golf, and so on.

THE WITNESS: I like that, Judge.

A And every evening--this is the eight to twelve forecastle, there is these men, two A.B.'s (41) and one ordinary, of which two of the boys was young fellows, white fellows, and one was a middle-aged white man.

Well, every evening between 6:15 and 6:30, I am always down in the forecastle for all that watch for rummy games because them is the only one to start the game. After the eight to twelve start it, then the twelve to four--the twelve to four, and sometimes the games go on all night to five or six o'clock in the morning, but every evening when I go down to call Medina he was always down in the forecastle and this guy by the name of Pittaway, him and Medina was always in bed wrestling and hugging. I seen that continuously, then I reported that to the steward's department delegate which is the guy that looked after the steward department interests.

Q I am going to stop you just a minute, Mr. Thompson. You are talking now about the first couple of voyages, aren't you?

A I got to bring that out.

Q Yes, sir.

THE COURT: He is doing all right.

MR. GLEASON: I am sorry, I just wanted him to place the time.

THE WITNESS: I have not got to the night of the accident. And every evening, Judge, like I say, I (42) went down and the door was wide open and I walked in and I called the boy. Sometimes Pittaway would borrow money from me and Medina would if they were broke, as well as when I get broke in the game I borrow from Medina and Pittaway and most any one of the crew because we loan money to each other for games all the time, because I borrowed money from Medina

but he borrowed more from me than I borrowed from him at the time.

Well, the door was wide open and they was in there playing and hugging so once or twice I said to Caplis, I said, "I don't like what is going on down there because Pittaway, Medina and this other guy is always hugging and playing in bed."

So Caplis said, "I notice that too."

Well, I told that to the chief steward and he said he is waiting to catch up with Medina so he can put him off the ship because he don't want that on the ship.

THE COURT: I suppose that is pure hearsay.

MR. GLEASON: It shows this--

MR. HANRAHAN: This chief steward has testified; Caplis has testified, can we get their stories direct from them, not what this man says?

THE WITNESS: I'm only telling the Judge.

THE COURT: Please just remember that your counsel will take care of your rights.

(43) THE WITNESS: Yes, sir.

MR. GLEASON: It shows the condition of the mind of the chief steward, your Honor, who is the responsible officer aboard this vessel and indeed the boss, as you might say, of both Medina and Thompson. It shows his attitude of mind at that time. This is some time before--

MR. HANRAHAN: I think that is irrelevant to this.

THE COURT: The chief steward's name is?

MR. GLEASON: Schiffer.

THE COURT: Schiffer. He was talking about some Caplis, he did at first, but now he's talking about the chief steward?

THE WITNESS: Caplis was there.

MR. GLEASON: Caplis, as I understand it, is the union delegate.

THE COURT: You have taken the testimony of Caplis, have you?

MR. GLEASON: Yes, sir.

THE COURT: You have taken the testimony of Schiffer?

MR. GLEASON: Yes, sir.

THE COURT: That is stipulated, isn't it?

MR. GLEASON: Yes.

(44) THE COURT: Of course, then, if what he says is only what their testimony says, it cannot be harmful even though it is hearsay and it may help me understand a little better what he is saying.

MR. GLEASON: I am proceeding.

THE COURT: Now, does the defense claim that what he has just said in the form of hearsay goes beyond the fact of these depositions that are stipulated in?

MR. HANRAHAN: I think it does.

THE COURT: What?

MR. HANRAHAN: I think it does. He testified just now that Schiffer was waiting to get evidence and there is nothing, absolutely nothing, in Schiffer's deposition to that effect.

THE COURT: All right. If you claim it goes beyond, I guess we have got to strike it out and the Court will disregard it. Proceed.

Q Go ahead, Mr. Thompson. A You don't want me to talk about the steward any more?

THE COURT: You can talk about the steward but don't repeat his words because the steward has already talked for himself, do you see?

THE WITNESS: Yes, sir. Well, I was only trying to tell you what I tell the steward and what the steward said to me.

(45) THE COURT: You can tell us perfectly well what you said to the steward but don't tell us what the steward replied.

MR. HANRAHAN: I ask that the man be asked specifically as to when this report to the steward was supposed to have taken place. Was this the week before the assault?

MR. GLEASON: I'll pin that down, your Honor, but I would like to be heard, your Honor, on the relevancy, the exact relevancy of this testimony on what the chief steward said.

THE COURT: It may be perfectly relevant. Let's admit its relevancy, but it is incompetent if it is hearsay.

MR. GLEASON: It is not hearsay for this reason: that he is an officer and his state of mind can bind the vessel.

THE COURT: You cannot prove his state of mind by pure hearsay.

MR. GLEASON: This is not hearsay, your Honor, if I may urge my argument, it's not hearsay but it is a statement of what the steward was doing and intended to do. It is a statement of what the steward knew at that time. It is a statement of the condition of the steward's mind in regard to Medina.

(46) THE COURT: I don't quite understand how it goes beyond the scope of hearsay.

MR. GLEASON: Well, your Honor, if my state of mind were in issue here, and I made a statement to your Honor that portrayed my state of mind--

THE COURT: Now, let me ask you--

MR. GLEASON: That would not be hearsay.

THE COURT: What is the bearing of the steward's state of mind, anyway?

MR. GLEASON: The bearing is this, your Honor, that it was the duty of the chief steward, as not only an officer of the vessel but as boss of the stewards' department, to see to it that a man of Medina's propensities and his disposition did not stay aboard the vessel.

THE COURT: Well, counsel, all he has said is that the steward said, "I am going to do my duty."

Well, it is presumed that every man is going to do his

duty, so I say the state of mind is irrelevant as this is presumed.

MR. GLEASON: Well I think we can proceed, your Honor, if Mr. Thompson will just couch his testimony in language that will give your Honor a picture of what he did, whom he went to and what he did.

THE COURT: Mr. Thompson, anybody that you went to, be it the steward or your union steward, or (47) anybody else to whom you made a complaint about him, tell us what you said, not what they said.

THE WITNESS: Yes.

Q You go ahead there, Mr. Thompson, and if you are puzzled at all on how to proceed you just ask the Judge. I want you to give in narrative form to the Judge just exactly what happened up until the time of your assault. Now, will you go ahead and tell the Judge. A Well, I told the steward that Medina was not fitting--

THE COURT: Was not what?

THE WITNESS: Was not fit to be a member of the crew the way he was carrying on. That is all I can say about the steward because I don't want to say what the steward said, I am forbidden.

THE COURT: You probably gave him some details, didn't you? Didn't you tell the steward why you thought Medina was unfit?

THE WITNESS: Well, I didn't come back to that night yet, Judge, this was before.

THE COURT: All right, I don't want to put words in your mouth. It just seemed to me likely that you told him why you thought he was unfit.

Q Did you tell the steward you had seen him kissing the crew?

MR. HANRAHAN: I object to him leading.

(48) Q Mr. Thompson--

THE COURT: I don't think you should lead unless you have reason to believe that he has overlooked something.

Q Well, Mr. Thompson, are you hesitating now because you think you cannot testify in regard to certain things, because if you are go ahead and we will stop you if you get off the track.

THE COURT: Tell us just what you said to the steward.

THE WITNESS: I told the steward that Medina was not fit to be a member of the crew because he is more of a woman than a man, that night. That is before the accident. That is all I told the steward.

THE COURT: Was that the very night of the accident?

THE WITNESS: No, Judge, this was before the accident.

THE COURT: All right.

Q Now, Mr. Thompson, will you come down to the night before the accident and will you tell us what you did after supper.

A Well, this is the night of the accident. This is what happened

and that is what I seen. It was between 6:15 and 6:30. I went down to the forecastle to call (49) the boys as usual.

THE COURT: In the forecastle?

THE WITNESS: Yes, that is where I always call them for the game. We always played cards in the mess room but the crew members lived below.

THE COURT: I thought you told me before that they lived after. Now he says in the forecastle.

THE WITNESS: The forecastle is back after, Judge.

MR. GLEASON: That is their mistaken application for their quarters, your Honor. Go ahead.

THE WITNESS: And, for the first time since I had been on the ship, the door was closed that night and I am sorry I didn't knock before I went in because if I did I wouldn't have it this day. When I went in the old A.B.'s bed was on this side (indicating). He was in bed and Pittaway was this side to the wall. I can't recall the other seaman's name, but three men was in the bed, Judge, one of these boys was laying down and Medina, I don't know just what to call it, Medina was on top of this other boy and had this boy's testicle in his mouth, and this other boy was behind Medina with his pants down. That is what I seen, the three men, and I said, "What is going on here?" And they all jumped up and tried to get their clothes on together.

(50) When I went back upstairs I went to Caplis and tell him

what I seen.

THE COURT: Caplis is the union delegate?

THE WITNESS: The department delegate, Judge. We bring all trouble to him and he take it up, and after speaking to Caplis I went to the steward and I told him what I seen, but you have forbidden me to say what the steward said.

THE COURT: All right.

THE WITNESS: I told the steward just what I seen and that is all I can tell you about the steward, because if I can't--

MR. GLEASON: Don't let's argue. You tell the Judge. First of all, I want to go back just one little bit. When you say testicle there, do you mean penis?

THE WITNESS: Yes, sir, his penis.

Q That is the word that you know, is that right, sir? You know what a penis is, is that right, sir? Don't be afraid to talk out.

May I pursue this just to get exactitude? When you saw this, Mr. Thompson, did you see one of the men--will you again go over it and tell us whose penis was in whose mouth? A The man was laying down which was.

THE COURT: Supposing we leave that, if desired, to

(51) cross-examination.

MR. GLEASON: Thank you, sir, I appreciate that.

Q I want you, Mr. Thompson, to look at me, will you, and in telling the Judge what happened from then on I want you to tell him

what you said and what the other person said, to whom you talked, and if the Judge wants to stop you or doesn't wish you to tell anything, he will tell you, but you go ahead in narrative form just as if you are telling a story and tell us.

THE COURT: When you said, "What is going on here," did any of them reply?

THE WITNESS: They was kind of scared, Judge, and they all jumped up and tried to get their clothes on together.

Q But none of them replied? A Well, I guess they didn't reply to me, or if they did, I didn't stay long enough to listen to the reply.

Q Mr. Thompson, may I refresh your memory there a little bit. Mr. Schopf, do you remember him?

A I can't remember the names.

Q Now, there was Mr. Pittaway and there was Mr. Medina and there was a third one. A Yes.

Q Do you remember the third one? A If I seen his fact, but I can't recall his name.

(52) Q Do you remember what his rating was?

A He was an able-bodied seaman.

MR. GLEASON: It has been said that Schopf was in the room at that time.

Q Now, did Schopf say anything to you about anything at all?

A No, Schopf didn't say anything to me but the old man was on this side and he said, "I am glad you came and broke this thing up,"

which I don't know his name because I don't ask them their names.

THE COURT: In other words, the person whose name you don't know said, "I am glad you came to break this thing up." Is that right?

THE WITNESS: That was spoken in the forecastle before I went out.

Q Was that addressed to you, sir? He said that to you, is that right, sir? A Well, he must have said that to me because I was the only man who was in the forecastle when that happened.

THE COURT: Was Schopf the old man?

MR. GLEASON: He was the man that he referred to as being the one whose name he didn't know, inasmuch as he has already said Pittaway and Medina.

THE COURT: He mentioned it, the old man.

Q Was there a fourth man in the room, sir?

(53) A As I told you, there was two A.B.'s on the watch and one ordinary, Pittaway is an A.B., I mean Pittaway is an ordinary, and there is Schopf is an A.B., and the third A.B.; the second A.B., he was in bed on that side (indicating).

THE COURT: He wasn't in on the party?

THE WITNESS: No, sir, no, not the third man.

Q He was the one who said, "I am glad you came in"?

A "and break it up," yes, sir, he wasn't in the party.

Q Did you report that, sir, and to whom?

A I reported that to Caplis.

Q And Caplis is who? A The department delegate, and I also reported that to the steward.

Q And after that report? A Tnat was the night of the occurrence. Well, the next night, that was Friday, the evening, the engine delegate, Caplis, which is the stewards' department delegate, said we are going to have a meeting up in John's room, that is the pump man. He is one of the delegates, the engine delegate, and we will talk this thing over. This was the night of the accident.

Q Yes. A Well, I went up in the room. There was Caplis, this Pittaway and this other guy, Medina, me and two other guys, (54) which I don't know their names.

Q Yes. A Well, this is what happened.

Q Before you go ahead with that meeting, I want to ask you just one thing, Mr. Thompson. When did you report the happening that you saw in the room? When did you report that to Caplis?

A The same night. That was Thursday night.

Q And when did you report it to Schiffer, the chief steward?

A I reported it to him, I think it was, the next morning.

Q Now, what time was it that the meeting was held that you speak about? A The meeting was called for between, well, I'll say, it's between 6 and 6:30, but it was pretty dark down in the Gulf of Mexico.

Q Pretty dark? A It was dark.

Q Well, Mr. Thompson, between the time that you reported this to the chief steward that morning and the time that the meeting was held, did anybody approach you and did Mr.-- did the chief steward approach you and talk about it at all? A Now you are asking me something that I can't testify. I told you what I told the chief steward but I can't tell you what the chief steward told me. I am forbidden to say (55) that.

THE COURT: He's not asking you to tell what the chief steward said, he's only asking you did the chief steward come to you to talk about it?

THE WITNESS: I told the chief steward what he said to me. That we finished there, he didn't come back to me.

Q He didn't come back to you at all? A No.

Q And did Caplis come to you at all in regard to this? A Caplis came and told me we're going to have a meeting in John's room, that is up on the deck.

Q Now when was it that Caplis came to you, Mr. Thompson? A It was some time during the day, I can't recall the hour but it was during the day of Friday.

Q Was that the only time that you talked to Caplis or to the chief steward in regard to this Medina incident?

A As far as I can remember.

Q I see. Now then, sir, you were told, however, the time of the meeting and the place of the meeting. Is that right?

A Yes.

Q And, as I understand it, it was to be in the pump man's room, the pump man's forecastle which was on the boat deck on the starboard side, is that right, sir? (56) A Yes.

Q I take it, for the purposes of brevity, that that was the pump man's door--the opening to the pump man's room or door was towards the forward part of the afterhouse, is that so, on the boat deck level? A No, the pump man's door was even with the deck.

Q Even with the boat deck? A This is the boat deck and the pump man's room was about here which opens out on the boat deck. That is where the meeting was, in that room.

Q Now, Mr. Thompson, that door opened onto a little deck on the boat deck on the starboard side, on the right-hand side looking forward? A It opened up one way or the other, I just can't recall.

Q Was there a deck outside the door?

A Sure, we got on deck to get to the room.

Q Now then, sir, did you go to the meeting?

A Well, as I said, we went to the meeting.

Q And what happened? A And we started to talk.

Q How many men were there? A It's between seven and eight, as far as I can remember. I want you to listen carefully because this is what happened in the meeting. After Young, which was the spokesman, I told him what happened and what I seen, and (57) Young said to me, he said, "Even if your story is true and you

see that you won't have nobody here to admit that is so because you were alone." That is what Young said to me. He said, "You have no ground to stand on."

This was in the meeting. Medina was there at the time. Then I said to Young and the rest, I said, "If Medina and these two boys will get off the ship in Corpus Christi, we won't bring no charge to the Coast Guard against them or the union."

Well, Pittaway and this other boy said they was willing to get off because they don't want to go before the Coast Guard because they are in bad now with the Coast Guard and they don't want the Coast Guard to catch up with them, and they was willing to get off.

THE COURT: They had had previous charges made against them?

THE WITNESS: Yes, they were in trouble with the Coast Guard and they didn't want to go back before the Coast Guard and they was willing to get off, but Medina said he wasn't going to get off and he got mad right away. "I am not going to get off," and he leaves the meeting fifteen minutes before it was over just like he thought everything was over. So the rest of us, we started to discuss this thing. Young said to me, he said, "I don't know, you got no grounds to stand on because you (58) won't have nobody to back you up even when we know Medina is a queer."

And I said, "Well, this has been going on but I never seen anything like what I seen last night."

Pittaway said, "Well, I don't want to get in trouble with the Coast Guard and I'm willing to get right off in Corpus Christi, now."

So I said, "Well, it's nothing I can do." Then outside of Caplis, the rest that was in the room said, "You won't have nobody to say yes against your story even when it is true." That is what happened in the meeting. Well, everybody started to go, going out one by one. It was pretty dark outside. This Young and I was the last ones because he was the spokesman of the meeting and he said, "Wait a minute, cook, I'll take my flashlight and show you through the door."

Well, Judge, like I was to show you, this is the deck (gesturing), and it comes here. There is the messman's fore-castle, there is a door here, which door is open and the light is in that room, but around this corner is very dark and on this side to come back. The door was on the other side. The door opened that way. Young said to me, "It's too dark around here, I'll take you to the forecastle," and when Young takes me to the forecastle, Judge, I was going right through the door. Well, I (59) couldn't see what was outside behind the door and just as I stepped out to go down the stairs I felt something hit me once and all I could see was lights and bells, and right again in succession hit me twice and then on one occasion I went back in the forecastle and I fell and I said, "Oh, Lord, he killed me." Then I was bleeding. Probably that is what stopped him from killing me.

Then Young and Caplis, and they picked me up and set me down by a chair and started to stop the blood while I was--

THE COURT: Did you recognize Medina's voice?

THE WITNESS: Right away, I saw him.

Q He said, "I am going to kill you"? A Yes, Judge, I saw him and he spoke those words but I didn't know he done struck me three times and I was pretty near senseless.

Q Did you see, Mr. Thompson, what he struck you with? A Yes, my own meat cleaver.

Q Now, I show you this and I ask you if this is an object which is a fair representation or fair copy of what he struck you with? A Well, I want to tell the truth about this because you might have to get the real thing. I would say the handle wasn't so long as this and it wasn't like that. (60) This was entirely a little too big.

Q Now, we will show you another one. I show you this object and ask you if that more nearly represents the object which he held in his hand? A Yes, your Honor, this was the length of my cleaver--give me this again. I want to show the Judge. It was as heavy as this and not as light as this but the same identical size but it was a heavy cleaver.

MR. GLEASON: Now I ask that both of them be marked in evidence as being the best demonstration that we can make to your Honor of the object.

THE CLERK: That is two separate exhibits.

THE COURT: 1-A and 1-B.

THE CLERK: Marked as P-1.

MR. GLEASON: Yes.

(Marked Exhibit P-1 in evidence.)

THE COURT: Now I presume, counsel, that the rest of the story will go as to what happened after the incident including perchance statements at the trial--I don't know--and treatment.

MR. GLEASON: Yes, sir.

THE COURT: And that will take considerable time?

MR. GLEASON: Yes, sir.

THE COURT: I suppose we best recess for lunch (61) now until two o'clock.

MR. GLEASON: Yes, sir.

- NOON RECESS -

- AFTERNOON SESSION -

WILLIAM THOMPSON, resumed the stand.

DIRECT EXAMINATION (Continued) BY MR. GLEASON:

Q For the purpose of the record, Mr. Thompson, these two cleavers, one is longer than the other and, as I remember--

THE COURT: The short one was the size of his but the big one was the weight of his.

MR. GLEASON: Exactly.

Q Now, Mr. Thompson, were you unconscious for a while?

A I lost control of myself for awhile, for how long I don't know.

Q In other words, you didn't know just exactly where you were, is that right, Mr. Thompson? A I think it was some time while I was in the hospital.

Q And were you placed in the ship's hospital? A In the ship's hospital, yes.

Q That is where you lost your consciousness, is that right, sir? A Yes.

Q Have you any idea how long you were unconscious, sir? Was it a matter of days or a matter of hours? A It is a matter of hours, not days.

(62) Q I see. And after you regained consciousness, did you take note of what they were doing for you? A Yes.

Q And what were they doing for you? A The purser was in maybe every ten or fifteen minutes. He was dressing my head and finding out what I wanted to eat. He gave me water and pills.

THE COURT: Pills?

MR. GLEASON: Pills.

Q Did those pills make you more restful or rested, Mr. Thompson? A Yes, every time I would take them I would go off to sleep.

Q How often would you take those pills or did you take those pills? A I just can't say how often he gave them to me but he gave them to me when I asked for it and I just can't say how.

Q I guess he probably gave them to you about every time you

woke up, isn't that right, Mr. Thompson?

THE COURT: Well, in that state he would probably not know.

MR. GLEASON: Probably not.

Q Do you remember whether you ate anything in your stay in the ship's hospital? (63) A Yes, I had soup and juices.

Q Did you take those through a straw? A That is true, they gave me water and stuff through a straw while I was laying down.

Q Did you ever take your head off the pillow at all while you were in the ship's hospital? A Yes, I raised up for a while.

Q Now where was the next port of call?

A Corpus Christi.

Q That is in Texas? A Yes.

Q Do you remember when the vessel got there? Do you remember the date, Mr. Thompson? A It was on a Sunday night, I think it was January the--

THE COURT: The 15th.

THE WITNESS: Wasn't that on a Sunday?

THE COURT: That is correct.

THE WITNESS: Yes.

Q Were you taken from the vessel? A Yes.

Q How? A The Coast Guard and Sheriff was down and they took me on a stretcher and passed me on the boom over the

ship to the ambulance and I went to the hospital and two (64) doctors were there ready to operate on my head, Dr. Russo and Dr. Perkins.

Q Before we get to those, Mr. Thompson, do you know of your own knowledge, did you see Medina--what happened to him after he assaulted you? A If I seen him?

Q Yes, did you see him or did you just hear about it? Did you, for instance, see him taken off the ship? A I knew the law was there to take him off but I didn't see him because I was-

Q We will pass right over that and take you right to the hospital. Now when you got to the hospital, what did they do with you? A They had the table all fixed and waiting for me and they had me on the table and they put something in my head and around here (indicating).

Q Now, Mr. Thompson, after you were struck, I take it, you were in pain. Is that right? A Yes, I was.

Q Now, will you describe to the Judge just what that pain was like in your head, after you were struck. A Well, I would like to tell the Judge the truth. The pain I feel when I was struck and the pain I'm having now for the past two years is exactly two different things.

Q Well, you tell the Judge what the difference is, (65) Mr. Thompson, that is what I want you to do. A The difference in the two pains, Judge, when I was struck, while the wound was still fresh, it hurt me on top but didn't hurt me down here at all, just on top of the crown. Then after the operation, they had a

drainpipe that leads from here to something to drain, whatever was coming out of my head. I think they was giving me penicillin every hour or every two hours in the hospital, I just can't say how many times they was putting it into me, and when I settled the case with the insurance company--

Q Let's not get to that yet, Mr. Thompson.

A That's all on the pain. I have got to bring that in to express what is going on.

Q All right, you go ahead and tell the Judge and I'll sit down. A Shall I do that?

THE COURT: You compare the two pains.

THE WITNESS: I have got to do that to compare the two pains.

Q You do it just as you were going to do it.

A I thought I was well, Judge, when I settled the claim because I didn't have no pain here, just on the top. I had my head hurt here a little and when I use lots of Anacin tablets, when I take powder, the pain go away and come back, and when I use them again, and the (66) feeling I have on the head now for the past two years--I'm in fine shape, I can compete with any cook in the world and any baker, and I had a job as cook and I went in the galley to cook and my head hurt me so much during the heat. Sometimes I fall out, I can't do it, then I try second cook's job and it's the same. Now, right where I had this wound in my head, at times I have cool spells, just like cold water running from here right to my temple and it shakes me

something like that and I lie down for a minute and then feel all right. Then the same spells comes like something warm just boiling up in my head and comes to the same place, then, any place that happens I fall out and that just continues like that and up on this side just from here down to here (indicating).

THE COURT: Now, are you talking about how it is now?

THE WITNESS: Yes, now for the past two years now, Judge.

THE COURT: But it was not like that immediately after you got hit?

THE WITNESS: I thought I was well.

MR. GLEASON: Let's get back to immediately at the time you were--

THE COURT: When you were hit, if I understand you correctly, you had the pain on the top of your head only.

(67) THE WITNESS: Just where the sore was.

THE COURT: Yes.

THE WITNESS: Yes.

THE COURT: When did you start to get these pains down through your head?

THE WITNESS: I had pains but not the pains like I am getting now because this cut here started to hurt again and then it sent me pain down here and for the past three months all my diet is soft food. I pick up a piece of steak or pork chops, which I like, or chicken, I can't eat it because when I chew like

that all this side hurts me and all I live on is soft diet.

THE COURT: Do I understand then this accident having occurred in 1950--

THE WITNESS: 1950.

THE COURT: --that then you only had the pains on the top, but for the past two years, namely '51 to '53, the end or beginning of '54, you had these pains down into the lower part of your head?

THE WITNESS: Yes, right from here, Judge, right where the sore is down here.

MR. GLEASON: He is pointing to his cheek.

THE COURT: Pointing to the ear and cheekbone.

MR. GLEASON: Yes.

THE WITNESS: I can't lay down, I can't sleep (68) on this side because any time my ear touches the pillow or anything, it's just like something shot me right on this side.

MR. GLEASON: Pointing to the right side.

Q Sir, you did have pain in the place where the cleaver struck you. You had pain there even before you went to Corpus Christi Hospital, didn't you? A You mean after I was hurt?

Q Yes. A Yes, pain all this side of my head.

Q Now, Mr. Thompson, did you ever have pain in that side of the head before Medina hit you with that cleaver? A I don't see how I could. This side of my head don't bother me. The only side of my head bothers me is this side, from here down.

Q Did you ever have headaches before Mr. Medina hit you? A Nothing to think about, which I think everybody has headaches at times.

Q In other words, sometimes, if you stay up too late or something like that you have a little bit of a headache? A Yes, when you play cards all night you don't feel good and then you take a cold shower.

Q You had done that and you had had some headaches, isn't that right, Mr. Thompson? (69) A Yes.

Q But you never had that sort of a headache that you had on the side of the head or the top of the head that you had after Mr. Medina struck you, did you? A No. In fact, what is going on in my head right now, Judge, it's just like a conflict in my head right now. I don't know what it is but there is something in there that has got to come out.

Q Now how did you feel when you were in Corpus Christi Hospital? You must forgive me for asking you these questions because it doesn't seem manly for one man to ask another man about pain but we do want it in the records, so will you just tell me how you did feel in the hospital when they took you over to Corpus Christi Hospital. Were you uncomfortable? A Well, I'll tell you. For the first maybe four or five days I wished I was dead instead of alive. That is how I felt while I was in the hospital.

Q Did they operate on you, Mr. Thompson? A Yes, right away when I got--they got to operate to sew these places up.

Q Did they give you ether when they operated?

A No, I am sure they didn't give me no ether but they put something there to kill that so I couldn't feel what they were doing to my head. My head was about that big.

(70) THE COURT: Local anesthetic.

MR. GLEASON: Local anesthetic.

Q Now, you overheard a remark by one of the treating doctors, didn't you, while you were at Corpus Christi?

A I thought I heard a remark and that remark is what put new life in me. Judge, can I say what I heard?

THE COURT: I have not heard any objection.

THE WITNESS: I knew then--I was in bed, I was hurting bad, I think it was about three or four men came in and I think the doctor called me two or three names and I didn't answer, and the nurse called me and I didn't answer, but this much I knew: it couldn't be no one but one of the doctors said that whoever it is--because he said to the men if any one of them got them three licks in the head--it's a name, I don't want to call because probably they thought I was not awake or they wouldn't have used that name--got these three licks in the head, they would have been dead but this boy is not going to die, "He is going to live--but we think he's going to have plenty of trouble." That's what I heard and that's what put new life in me.

Q Up to that time you wanted to die? A I wanted to

die because I didn't feel like living.

Q After that you decided you were going to live.

A I decided I would eat everything.

(71) Q Did you? A Yes, I did, too.

Q How long--when I ask you how long and what days and everything, don't think I'm holding you down to hours. Just approximately I want you to give the Judge the picture of your hospitalization from then on, so will you tell us approximately how long you stayed at Corpus Christi Hospital? A I thought I got there in January and left in March. I'm not sure. Or, it could be the last of February. Somehow I am not sure of the date but I was there over three weeks before I was transferred to the Marine Hospital in New Orleans.

Q In New Orleans? A Yes.

Q Now, at that hospital, did you first meet Mr. Haloran?

A Mr. Haloran?

Q Isn't that the name? What was the name of the agent of the steamship company who came to you and talked money to you for the first time? A No, Mr. Mahoney, I think.

Q Mahoney? A He didn't come to me and talk any money but I know this much: while I was in the hospital in Corpus Christi there was three or four different lawyers which I didn't

(72) care to know. Some of them went and offered me as much as $800 for my case and I told them I didn't want no lawyer because the agent from the company told me they would take care of me when I

got well.

Q Who was that agent, Mr. Thompson?

A Mr. Mahoney.

Q When did you first see him? A When I first saw him? That is when I came back to New York from the hospital, I mean when I first come back to New York from Corpus Christi, I mean from New Orleans.

Q Did the lawyers come to you in Corpus Christi?

A The lawyers came in the hospital in Corpus Christi.

Q And you told them the agent for the steamship company had told you he was going-- A No, I didn't say the agent told me, I said I didn't want no lawyers because the agent would take care of me when I got well. I don't want to say the man said something he didn't say.

Q No, and I don't want you to.

THE COURT: Had you seen the agent at that time or did you just imagine that he would take care of you?

THE WITNESS: No, Judge, I wrote to him and he wrote to me. I think I have got over three or four letters from him but right now I can't find those letters (73) and maybe the letters that I wrote him, he saved them, but mine I can't produce.

THE COURT: You didn't write him while you were in Corpus Christi Hospital, did you?

THE WITNESS: Yes, Judge, I did.

MR. GLEASON: If counsel has the original of the letters that Mr. Thompson wrote to the company, or its agent, and the carbon copies of the answers thereto, I call for them at this time, Judge, if your Honor please.

MR. HANRAHAN: Judge, for your convenience I have the letters in chronological order.

THE COURT: Let counsel see them. Are they important enough for us to take a short recess?

MR. GLEASON: I have them right now. I take it, Mr. Thompson, you wrote two letters from Corpus Christi Hospital?

THE WITNESS: It could be two and it could be more.

Q Now I show you this letter and ask you if that is in your handwriting? A Yes, this is mine.

MR. HANRAHAN: Do you want to read the date?

THE WITNESS: February 6.

Q And I show you another and I ask you if that is in your handwriting? (74) A That is my handwriting.

MR. GLEASON: Judge, may I read these letters?

THE COURT: Why not give them to me?

MR. HANRAHAN: No objection.

THE COURT: He said he didn't want to read them.

THE WITNESS: I just mean I didn't feel like reading them.

THE COURT: I would be very glad to have you read them. I thought maybe there was some reason why you did not

want to read them.

MR. GLEASON: (Reading) "Memorial Hospital, Corpus Christi, Texas, February 1. Sieling and Jarvis. Dear Sirs, the doctors think that the worst is over. I am still a little dizzy. I can't sit up in bed and walk to the bathroom and back. I'm thankful that I am alive after what happened. I think that I will be able to travel in six or eight day's time if I continue to improve like I am doing now.

"Will you kindly see about my transportation up to New York. Also will you let me no the whereabouts of the Rosina Marron.

"Please if any mail at the office for me will you send them to this hospital for me. Hoping to hear from you soon. Thank you very much. From - William Thompson, (75) Second Cook, Rosina Marron."

Did you receive this answer to that letter-- This is a carbon copy, your Honor, which counsel has put at my disposal.

"February 6, 1950, Mr. William Thompson, c/o Memorial Hospital, Corpus Christi, Texas. Dear Sir: We have for acknowledgment yours of February 1, 1950, and are most happy to hear that you are progressing satisfactorily and will be able to travel in the near future.

"We have written our agents, Collin and Gissel, 502 Cotton Exchange Building, Houston, Texas, and requested them to contact you with a view of rendering whatever assistance

might be necessary.

"We look forward to seeing you upon your arrival here in New York.

"Very truly yours, Sieling and Jarvis Corporation."

And then your letter, Mr. Thompson:

"Memorial Hospital, Corpus Christi, Texas, February 9. Sieling and Jarvis, Sir, I got your letter this a.m. I did not hear from Collin - Gissel. The doctor here wants to send me to Galveston Marine Hospital. I told him I would rather go to New Orleans Marine Hospital. I would be near my family for they can come to see me twice daily. He said he can send me to Galveston (76) free but New Orleans I will have to pay my own way. I told him I will so I am leaving tomorrow, Friday, for New Orleans.

"My head is still sore inside. It keeps me dizzy a lot. He said I will need to be in the hospital another three or four weeks. As soon as I am well, I will come to New York. I am hoping to get my job back on the Rosina Marron.

"If any letter comes for me please send them c/o Marine Hospital, New Orleans, La. Thanking you very much from William Thompson."

Q Now, sir, you had that copy when you spoke to the lawyers at Corpus Christi, did you? A What lawyers?

Q Did you tell us, Mr. Thompson, that lawyers visited you at the Corpus Christi Hospital? A Yes, sir.

Q And you refused their services because you were going to deal directly with the company. A With the company, yes.

Q Is that right, sir? A Yes.

Q Now, how did you get from Corpus Christi to New Orleans? A Well, the morning just before I left they had an agent in Corpus Christi that called a nurse and told me to (77) come to the office and pick up transportation. Well, I got a cab from the hospital and I went down to the agent and I got a hundred dollars for transportation.

THE COURT: The agent for whom?

THE WITNESS: Sieling and Jarvis. Sieling and Jarvis contacted that man, of course, that is the agent where the ship goes when we are going to Corpus Christi, and he gave me a hundred dollars for transportation. Then I went on to New Orleans and I was in the hospital for a while and the High Sheriff there at Corpus Christi sent a subpoena for me to come to the trial in March in Corpus Christi.

Q Whose trial? A To the trial.

THE COURT: Of Medina?

THE WITNESS: Of Medina. They wanted to know if I could travel so I asked my doctor and he said, "Well, I don't know but if you want to go and want to take the chance--" and I told the doctor, "Yes, I will take the chance to get it over."

And from Galveston I got to go to Houston to get a train and I got to Houston that night and I took sick and they took me

to some hospital and sent for an ambulance from Galveston Marine Hospital to come and get me and take me to Galveston. And when I get to Galveston (78) I explain to the doctor where I was going and what time I should be there. Well, the doctor get in touch with the F.B.I. and he came over to see me and he wires or called the High Sheriff or Clerk of the Court that I was sick and it was impossible for me to get to Corpus Christi for the trial. Then they postponed the trial, I think maybe for another week or two while I was in the hospital. Then when I left the hospital in Galveston, I went back to Corpus Christi for the trial, but while I was in the hospital at Galveston there was some agent from Sieling and Jarvis. I don't know whether he was a lawyer or not because I wasn't interested. All I was interested was to get well and get out and he was very nice, he wanted to know how I was getting along and I told him I was getting along nicely, I will be able to travel again for the trial soon and he wanted to know if I needed any money and I told him, "No, I didn't need any money because I have enough to carry me along."

And I think he gave me a card and said any assistance he can do to call him up because he is from Sieling and Jarvis but I never did get in touch with him anymore.

Q You eventually did go to the trial and testified?

A I was at the trial because they postponed it until I got well so I could be at the trial.

Q While you were sick--this sickness that kept you (79) from Medina's trial--what was that sickness? Will you explain that? How did you feel? A The sickness was my head. I had great pain in my head and every time I walked I got to hold onto something otherwise I would fall down.

Q You were dizzy? A Yes, and in Galveston Hospital I don't know because I didn't know it but that is what they told me there. There was a lady doctor on at night and I guess I must have cracked up.

Q In other words, you passed out? A No, I wasn't passed out. I'm trying to tell you just what happened.

Q You mean by crack-up you just-- A I just went crazy and didn't know what I was doing and then I didn't have no slippers on and didn't have no pajama top and they caught me going downstairs and I didn't know anything about it, so they got a man and called me and put me to bed and she gave me something to put me to sleep. The next morning I felt all right and all the boys were telling me about what happened and the doctor came up to see me and I didn't know anything about it. I think it was two days later they sent me to John Seeley Hospital to see a specialist which was a lady.

Of course I don't know but they put some kind of (80) thing like soup all over my head and on my face, and about fifty or one hundred different little wires and got me in a chair, wires on my arm and wires on my knee and they were testing me.

Q That was an electroencephalogram. A I don't know

what the name of it was but that is what. So they tested me up for about an hour and then after everything, she gave me a towel and soap and I cleaned myself and I said, "Doctor," I said, "how am I doing?"

And she said, "Well, you're doing pretty fairly."

Then I asked her a few questions and then she said she is not permitted to tell me everything.

Then after leaving the trial at Corpus Christi I came back to the Marine Hospital in Staten Island then I was really sick over there.

Q How long were you there? A Where?

Q At the Marine Hospital at Staten Island, the Stapleton Hospital? A I must be there maybe three weeks or a little over, but while I was there they sent me to Ellis Island and had the same test that this lady specialist gave me in Corpus Christi.

Q The same electric wires and everything?

(81) A The same thing. Well, I don't know, these little things sticking out and different things. At times the doctor frowned and at times he was all right. So after he was all through I said, "Doctor, do you think I make the grade?"

And he said, "Yes, you will make the grade."

And then I asked him a few questions and he said he wasn't allowed to tell me a thing and I didn't ask him any more.

Q How did you feel during the time of the trial and during the time of these hospitalizations at Galveston and New Orleans and

Stapleton Marine Hospital? Will you explain to us how your head felt. A Well, during those times I know I was sick from here on down.

Q Meaning from the neck? A Yes, from the neck on down. Now, at sixty-three I can do any kind of work and I bar no man but all my trouble now is in my head and comes here.

Q And at the side of your head, is that right?

A No, this side don't bother me. My trouble is just from here to here (indicating). That is all that bothers me now.

THE COURT: The right side of the head, the ear, the cheekbone.

(82) Q Yes, the right side of the head. Now, Mr. Thompson, there came a time, did there not, when Sieling and Jarvis, or somebody from Sieling and Jarvis or the steamship company, and you began to talk about money. Isn't that right, sir? Will you tell us about that? Will you tell us about the events that led up to your signing that paper? A Yes. While I was in Staten Island Marine Hospital I called Sieling and Jarvis up because they told me if I needed any cash to call them up. Well, I needed fifty dollars while I was in Staten Island Hospital and he sent it over for me right away, and when the doctor discharged me from the hospital I didn't feel well; I felt like I wanted to go someplace in the country where I could rest up and just run around until I felt good. That was my intention. I went over to Sieling and Jarvis and Mr. Mahoney asked me, he said, "How much money will you need to go

wherever you want to go?"

And I said, "I need about three hundred dollars."

Q Will you excuse me just a moment. I want to ask you one question, Mr. Thompson. Had you seen Mr. Mahoney before that time? A That is the first time I saw him.

Q All right, you go ahead, excuse my interruption.

A And he asked me how much money--

(83) Q You needed to go where you wanted to go.

A I said maybe three hundred dollars and he wrote a check and I signed it and he gave me the money right in the office, and I think I went away for maybe three weeks or a month.

Q Where did you go? A I went down to Arkansas and I came back to New York. I was feeling all right, like I do now, but just my head was hurting, well, a continuous hurt, so I thought I was all right.

THE COURT: I don't quite understand what you mean that you thought you were all right when your head was continuing to hurt.

THE WITNESS: Well, the same feeling in the hospital; when the doctor discharged me from the hospital I had the same pain in the head.

Q In other words, on the top, is that right?

A Right on this side.

Q Where the wound was? A Where the wound was, this side don't bother me at all.

Q Mr. Thompson, what we want to know is this: at the time that you came home from Arkansas you said that you felt pretty much all right. A Yes.

Q Now, at that time, up to that time, did you have any (84) of these pains going down your face? A I had continuous hurt with these pains, that cold and warm spell wasn't running down then.

Q It had not begun then? A It had not begun.

MR. HANRAHAN: He didn't say that.

MR. GLEASON: I'll get him to talk, I am trying to save time.

THE COURT: You said at the time you saw the agent the pain was the same as when you were discharged from Staten Island Hospital?

THE WITNESS: Yes.

THE COURT: What did the doctor tell you at the time you were discharged from the Staten Island Hospital?

THE WITNESS: The doctor told me that he thnks I would be all right, I am pretty sure. He gave me thirty or sixty days convalescence. I am pretty sure it was either thirty or sixty days.

MR. GLEASON: Do you wish to ask another question, Judge?

THE COURT: No.

Q Now then, Mr. Thompson, you did have some pain at that

time up where the wound had been, is that right, sir? A Yes.

Q Now, was that just a pain at the skin level?

(85) A It was just an ache in the side, my head, just like something was going out, just like something stuck in my head, pain.

Q Did you and Mr. Mahoney have a talk then about settlement of the case or any money coming to you or anything like that?

A Yes, this is what happened. Mr. Mahoney said, I think the hundred dollars transportation they sent to me, the fifty dollars in the hospital, the three hundred dollars, which was $450, and Mr. Mahoney was talking to some man from the insurance company.

Q You mean over the 'phone? A Over the 'phone.

Q Did you hear some of that--one side of that anyway?

A I'm getting back to just what--

Q Yes, go ahead. A What he said to Mr. Mahoney I don't know.

Q But you heard what Mr. Mahoney said to him.

A Mr. Mahoney said to him--once Mr. Mahoney said, well, I think five thousand dollars, and then they talked for about fifteen or twenty minutes so Mr. Mahoney hung up and he said to me, he said, "Mr. Thompson, the best we can do between the moneys we gave you and what we are about to offer you will be about four thousand dollars and that is the best we can do because you are well."

(86) THE COURT: Is that what he said?

THE WITNESS: That is what Mr. Mahoney said.

Q Because you were well. A Because I am well.

Q Go ahead. A I said I might be sick for a long time but I don't know it, but anyway before that he sent me to some doctors, Dr. Farr up on Sixty-fifth Street and Park Avenue and he gave me a real good examination and sent me to get some x-rays. But the doctor didn't tell me the outcome of it.

Q Did the doctor tell you anything about your condition at that time? A The doctor had not said a word. He just told me I was all right to go back, so I went to the insurance--

THE COURT: Wait a minute. Did this doctor on Park Avenue tell you you were all right?

THE WITNESS: He told me, he said, he didn't mention anything about my head, Judge, he just said, "You are a fit man."

Q You are what? A He said I am a fit man, I mean I am a well man.

I said, "Doctor, I want to tell you from here on down I can compete with the best but," I said, "my head is bad."

Q What did he say? (87) A He said, "Well, we will have some x-rays and we'll have to look at that," and that was all he said.

Q Did he get the x-rays back, do you know? A I don't know, I have not heard anything about him or the x-rays.

Q At any time did he say you were not a well man?

A No, he never said anything like that.

Q At any time did he say you are going to have more pain in

your head than you have now? A Not that doctor, no.

Q At that time had you accepted the services of a lawyer? A I didn't see any lawyer at all on the whole case. I was going by what Mr. Mahoney said, that he would do right by me.

Q Did any lawyers visit you in Staten Island Hospital while you were there? A Yes, I think there was about three or four but I wouldn't have anything to do with them like I did at Corpus Christi.

Q You didn't even talk to them? A Some was talking to me and I said, "No, I was going to the company, they promised to do good by me and I just don't want any lawyer."

Q Now, Mr. Thompson, when Mr. Mahoney said to you after talking over the 'phone--when he said to you, "Thompson, (88) the best we can do for you, including the money we gave you, is four thousand dollars," what did you say to him? A I said to him, "That is the best you can do?"

And he said, "Well, it's not me, it's the insurance people."

And I said, "I would like to see that man."

And he said, "You will, because you got to go to him to sign your release."

But now I want to tell you this: if I knew then like I know now, I was suffering then like I am now, I wouldn't have signed no release for nobody; I would have died before I would have done it.

Q In other words, Mr. Thompson, isn't it true that if you

knew the pain that you were going to have in your head and face in the last two years that you have been telling the Judge about, you would never have signed that paper? Is that what you are trying to tell us? A Yes, I would have never signed it because I keep going in and out of hospitals since.

Q Now, Mr. Thompson, did you take the money?

A Well, I get around to the insurance people. This is what happened: I can't recall the man's name, Baron, or something, I'm not sure.

Q How much did you actually get in cash then?

A At the insurance company, four thousand and take (89) away four hundred and fifty dollars from--

Q Did you get the difference between four thousand and the money that had been paid to you? A Altogether it made four thousand, yes, sir.

Q Now, then, did you sign a paper? A I asked this insurance man, I told him, I said, "Maybe I'm doing wrong." I'm telling you just what I said from my heart, I never told you this before.

Q You go ahead, you tell the Judge just exactly what you said and what you thought. A I never told the lawyer, Mr. Axtell, anything like this but I'm just telling it because I'm in the court. I told the man, I said, "I have been hurt," and Mr. Mahoney said he would do the right thing by me, "and that is the best you can do by me?" And he said, "Yes."

So he said to me, "How much money would you really like to get from this accident?"

And so I said, "Well, the way I feel, I might not be able to go back to work and if I do maybe I can't work for a certain time." I said, "Between fifteen and twenty thousand dollars."

And he said, "Did anybody tell you that?"

And I said, "No, I just answered your question to my own estimation."

So he said, "Oh, no, the best we can do is what I (90) offered you, four thousand dollars including the money we gave you."

Well, I didn't have no choice, I signed the release but I didn't know I was going to be sick like this.

Q You didn't have a lawyer, did you?

A I had no lawyer, I was depending on them.

Q You didn't have a bit of legal advice from the time you were struck by Medina, struck down on that ship, until you took the money and signed your name to the paper. You never had a lawyer explain to you your rights, did you? A Just what Mahoney and this insurance man said to me. They were the only two I spoke to.

Q And you had no idea that you were going to have the pain on the side of the face?

MR. HANRAHAN: I object to leading any further.

THE COURT: It is purely repetitious.

Q Since that time, Mr. Thompson, you have been in and out of hospitals, haven't you? A Yes, quite a number of times.

Q What hospitals? A I have been back in the Marine Hospital in New Orleans, Baltimore, Maryland, and Staten Island.

Q You have had more done to you than just your head? I mean you complained of other things except your head, (91) haven't you-- A Well--

Q --at those hospitals? A Whatever hurt me, but when I go to the hospital I go mostly for my head because it most sets me crazy at times.

Q In other words, when you went to the hospitals, you went because of your head, is that right, sir? A Yes, sir.

Q How--when, Mr. Thompson, did you begin to get these feelings that you have been telling the Judge about, that you have had for the last two years? When did you begin to get those?

THE COURT: Cold and hot spells.

Q Yes, those cold and hot spells. A Well, I took a chief cook's job on a passenger boat and I think I went around the coast maybe about twelve or fourteen days on the Santa Catalina, that was a Grace Line ship--no, that comes later. I took a chief cook's job on a freight boat. I signed up for a year which the boat stayed out about thirteen months, but I got to be paid off at Curacao and sent back to New York. I was sick, my head, every time the heat took my head it just sent me crazy, I couldn't do nothing. So the

captain take me to the doctor in Los Palmas in the Canary Islands (92) and the doctor found I was suffering and they took me to the hospital and gave me some kind of medicine and they had transportation waiting for me when the ship got back to Curacao, and I came back to New York by plane, and then I was taking outpatient treatment in Staten Island.

Q Before you get to that, will you tell the Judge just what exactly it was you felt at that time.

THE COURT: I have not got it clear when it was that he first got these cold and hot spells.

MR. GLEASON: That is what I am getting to, Judge. Thank you.

Q The Judge wants to know when you first began to get these cold and hot spells that bother you so much now.

A That is when I took a chief cook job or second cook job, every time I get around the range which is hot.

Q When was that, for the first time you noticed that, Mr. Thompson? Let's put it this way: how long after you signed that paper and took that money from the company, how long after that did you start getting these feelings of hot and cold in your head and in your face? A Judge, I'm pretty sure that started in 1952. I think I had a discharge for that boat. It was Sea Glorius, that's the boat I got to be paid off and sent back to the States from Curacao. Then I left that boat and I took a chief cook job in the Grace Line. I couldn't keep it. I thought (93) it would be all right and I take a

second cook job and I couldn't work around the range, and then I got to take the lowest job on the boat now, between a dishwasher or a galley utility, something that I get away from the range. I could be getting now between four hundred or five hundred and fifty dollars a month, and the best I can do now is $242 or $232. That is the only kind of job, utilities, that I can do, which I had a discharge here now to show that--

Q But before you got those hot flashes for the first time on that trip down to Curacao, that ended in Curacao, you did take the chief cook job, didn't you, sir? A That is the boat I was on.

Q Yes, up to that time, Mr. Thompson, you could work around the range, couldn't you? A I could work around the range.

Q But after that time you say you have not been able to work about the range because of your head and these hot and cold feelings, is that right, sir? A Well, I tell you, Mr. Gleason. I'll make a long story short.

Q Yes. A It cost me over forty dollars of my own treatment for Anacin tablets. When I am on these boats I take my own medicine instead of going to the hospital and getting (94) sick, I carry my own medicine.

Q This is even when you take the lowest job of utility man in the steward's department, is that right? A My head keeps hurting me all the time and I can't sleep at night. The only time I can sleep is if I can get out in the daytime and work all day and I'm

tired, and then I eat something and maybe I go off to sleep and don't know it because I'm tired, but I can't sleep nights now.

Q In other words, unless you exhaust yourself with physical work you don't sleep, do you, sir? A I can't, I'm just like a crazy man. On this passenger boat I just came off--

Q Now, sir, there is, is there not, an urge in you, a continuous urge?

MR. HANRAHAN: I object, your Honor. Let the man tell his own story.

Q Is there any other urge you have that sends you to work in spite of the fact that you know your head is going to ache?

MR. HANRAHAN: Let him generally ask what other experiences the man is having.

MR. GLEASON: You can't do that with a witness like this.

Q Mr. Thompson, will you tell us how you feel when (95) you are shore-side, when you are not working on a ship? You tell the Judge and don't be afraid to tell him. A I can't be afraid because whatever I am telling it's what is happening to me.

Q That is right, you tell the Judge exactly how you feel when you are not working on a ship. A Judge and Court, what is going on now with me, if I can keep moving, just take my mind off what is going on in my head, I can go all day. I can ride the train, I can travel but if I sit down at least three or four hours with nothing to do, I am just like I am crazy, my head works on me

that way. And some boats I can make two trips but the best I can make is one--I can make two and I got to get off because when my head starts to hurt me, I got to leave that ship and I stay around and I get another ship. Maybe I make another trip or two, that's all I have been doing for the past three years, which I have my discharge to prove it. Some ships I stay on for two trips but I don't complain. The boys ask me, "Thompson, what is wrong with you?" And I say nothing because I don't associate with them much. Sometimes I try to play cards a little and I leave three or four different times.

In the past year I wish I was dead instead of alive when my head starts on me and this spell that's going (96) on on me now and at the time if it goes on for an hour or maybe a half an hour, I guess I would be a dead man.

Q Will you tell me what that spell is like? A It's something in my head, I just can't tell, just something in my head. I feel crazy.

Q Is it accompanied by those hot and cold feelings?

A No, those only come by spells.

Q How often do they come? Tell the Judge how often they come these days. A Well, the cold spell maybe comes sometimes once or twice a month and the hot spell maybe twice every two months and then sometimes twice in two weeks. I don't know when it is coming on me.

Q Now, is there pain in your head continuously nowadays?

A Just the pain in my head right now. You see, these bandages

here, on my head here, Judge, was like this after I left the boat. I went right to the Marine Hospital in Staten Island and the doctor gave me some medicine which I had them--now took some x-rays and give me a appointment for the 23rd which was last Tuesday. I went back to the hospital, I said, "Doctor, how is my x-ray?"

And he said, "Mr. Thompson, your x-ray shows where--" I forget what he called it but it's something there, but (97) the head is healed up but there is something else and he said, "Now, I'm trying to help you if you will let me." And I said, "Doctor, I will do anything if you can get me helped."

And he said, "Well, I have got to shave your head from around the crop and inject something in your head three or four times. Do you want it?"

"Well," I said,--I signed a paper for that, and that is how come you see I have this bandage on.

And I think he stuck me in my head maybe four or five times or something because it made my head go about that big and my head was numb for a day and then with medicine he gave me--you can read it on the directions, it's to take them, I've been taking it ever since and I had an appointment there for tomorrow.

Q You went up to see Dr. Farr, didn't you?

A Yes, last week some time, last Friday.

Q That is the doctor that the defendant engaged to look you over, is that right, the other day? A He took the bandage off from the hospital because he wanted to take some x-ray of my

head and that bandage on there now is from Dr. Farr.

Q He put that bandage on there? A That is his own. He took the hospital one off.

Q Now that blood card that you have in your pocket. (98) I would like to see that. I would like the Judge to see it now because I want to put it into evidence.

MR. HANRAHAN: I'll let it go in if somebody will tell me what it is.

Q Will you give it to me, Mr. Thompson? You be sure to keep those in your envelope there, your discharge and your other papers.

MR. HANRAHAN: I object to it, I don't know what it is.

Q Where did you get this? A On February 7, when I got the job on the Uruguay. In the steward's department you have got to pass the doctor's test and the doctor gave me a full examination and found that I was fit for duty, and the doctor said, "Mr. Thompson, you had a head injury some time ago." I didn't know how he knew, Judge. I said, "Yes, doctor, I have had a head injury." And he said, "Is it bothering you now?"

And I said, "Well, doctor, it's hurting me a little but I have been on ship and been working," I said. And he said, "If I let you go on this ship you won't let me down, will you?"

And I said, "No, doctor, I think I can make it."

And he passed me because I was fit, all but my head and, Judge, I tell you, on that ship which about nine (99) or ten members

can prove it, we had over 450 passengers leaving New York down to Buenos Aires, and I would say 90 per cent of those dishes passed through my hands three times a day and my head was nothing but that all the time. Sometimes I lay back but I didn't let the doctor down because I didn't want him to get in trouble from signing me on when I wasn't fit to take the job but it almost killed me, but I would rather die than let the doctor down.

MR. GLEASON: I offer this in evidence, your Honor, this Moore-McCormack--

MR. HANRAHAN: I object unless they bring the doctor down and he testifies as to how the blood test connects up to a head trauma; the blood tests are for diseases.

MR. GLEASON: Let's put this away at the side of your desk until we--until we hear charges by the defendant that all of this syndrome--

MR. HANRAHAN: I'm not making the charge, I'm making an objection.

MR. GLEASON: --that all of these snydromes that we have here are caused by venereal disease. Now if we don't hear that--

THE COURT: It is rebuttal.

MR. GLEASON: If we don't hear that, let's forget about this blood test because the blood test is (100) negative. I offer it in evidence.

THE COURT: You see, counsel, unfortunately the

defendant's objection seems to be well taken.

MR. GLEASON: I see. At this time--

THE COURT: It may be well taken then from the standpoint of competency.

MR. GLEASON: May I recall this witness at this time because Dr. Somberg has appeared in Court and he is a surgeon as well as a neurologist and I understand, your Honor, his time is of the essence to him?

THE COURT: Is there no objection?

MR. HANRAHAN: No objection.

MR. GLEASON: Mr. Thompson at this time says he would like me to ask him one more thing.

THE COURT: Go ahead.

THE WITNESS: Judge, this blood test and physical slip, it is not for my head.

THE COURT: I understand.

THE WITNESS: It is for my body down--

THE COURT: I understand. The point is it comes from somebody else, not from you, and I am afraid that somebody else will have to prove it.

THE WITNESS: I got this from the Moore-McCormack doctor.

MR. GLEASON: Will you step down and wait in this chair, (101) Mr. Thompson?

(Mr. Thompson does so.)

HAROLD M. SOMBERG, called and sworn for the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. GLEASON:

Q Dr. Somberg, will you keep your voice up so that the Judge can hear you and counsel can hear you? A Yes, I will.

Q Where do you practice, doctor? A My office is at 31 Lincoln Park, in Newark. I also have another office at 129 East 73rd Street in Manhattan.

Q How long have you practiced medicine? A I graduated from the Long Island College of Medicine in 1940, and thereafter, following a period of six and a half years of postgraduate training, I went into private practice of medicine in 1947.

Q Have you a specialty? A Yes.

Q When did you first engage in that specialty and tell the Judge what that specialty is? A My specialty is neurological surgery and I have been engaged in this specialty all the time that I have been in private practice.

Q Do you actively practice neurology and neurological surgery here in Newark? (102) A I do. I am the attending neuro-surgeon at St. Michael's Hospital, attending neuro-surgeon at the Hospital for Crippled Children, associated neuro-surgeon at Newark Beth Israel Hospital, I am also consultant to St. Mary's Hospital in Passaic and at the Passaic General Hospital.

Q Have you clinic or hospital associations in New York,

of the Hospital for Joint Diseases and I am consultant neuro-surgeon Staten Island.

Q Now at one time did Mr. Thompson, who sits here in the chair and was in the witness chair, did he come under your individual care at all at Stapleton, in Staten Island? A I have no such recollection.

Q Did you examine him, sir, at one time? A Yes.

Q When was that? A January 5, 1954.

Q And will you tell the Judge what your examination consisted of first of all, and I will ask you more questions.

A Well, first I obtained a history from the patient of his present complaints, the course of events since the (103) accident of 1950. He was questioned about his past history and then following that I had photostatic copies of hospital records of his various admissions to the United States Marine Hospitals at Baltimore, New Orleans and at Staten Island, as well as the Memorial Hospital in Corpus Christi.

Following obtaining this history, the man was subjected to a complete neurological examination.

Q Now, Doctor, before we go further, and you will forgive me for putting in things one step at a time--we call it legal procedure--would you take a brief glance at this material I have put on your desk, which is mostly photostatic material, and tell the Judge whether that is the material, the hospital records that you examined in regard to William Thompson in making your examination and diagnosis?

A I think it is.

MR. HANRAHAN: Before you question further, I have a typewritten list of those. I would like to check off just what records you have. Is that all right?

THE COURT: I presume counsel represents that it is. Let's make that check at four o'clock instead of now.

MR. HANRAHAN: I am sorry, your honor.

THE COURT: Let's assume for the present purposes that counsel is accurate in his representation. (104) You can check on that at four o'clock.

MR. HANRAHAN: All right.

MR. GLEASON: I will offer this in evidence as a package, your Honor, or shall I hold that in abeyance until four?

THE COURT: I think you better hold that in abeyance until after he has had a chance to inspect.

MR. GLEASON: I would like, however, pending this going into evidence, to ask the doctor to refer to it from time to time.

MR. HANRAHAN: Let him put his in, that will save time and leave things orderly. I have no objection.

THE COURT: You have no objection to the use of this material?

MR. HANRAHAN: No. If it is not complete, I will put in more complete records. You see, your Honor, we have made a complete check here. I have got the records of this

man for about ten years, if he is putting in all the photostats that I gave him.

MR. GLEASON: I am.

MR. HANRAHAN: All right, I have no objection.

THE COURT: May it be considered marked?

THE CLERK: Marked P-2.

(Marked Exhibit P-2 in evidence.)

THE COURT: You have no other objection to (105) his testifying upon the basis of these records and history?

MR. HANRAHAN: No, no.

Q Now, Doctor, will you first of all tell the Judge presiding here what those records briefly--briefly what those records told you. I think, Doctor, you made a report on January 14, 1954, and I am sure that Judge Hartshorne will allow you to have recourse to that, if you wish to refresh your recollection, but you must ask him first.

MR. HANRAHAN: No objection.

THE COURT: You let the report as is. Well, I am still able to read.

MR. GLEASON: I am going to give you the original, your Honor, I will save a copy. Shall we mark it?

THE CLERK: P-3 in evidence.

(Marked Exhibit P-3 in evidence.)

THE COURT: (After reading) To make a long story short, Doctor, my casual reading of this would indicate that you find physically, as far as his body is concerned, essential normality

but that his fractured skull and so on in January of 1950, gave rise to some organic brain disease as the result of which you feel, that among other things, he has an anxiety state bordering on the schizophrenic.

106) THE WITNESS: Yes.

THE COURT: Isn't that about right?

THE WITNESS: Yes, sir.

Q Now, Doctor, will you explain first of all, Doctor--take or the sake of this question the truth thereof that Mr. Thompson--

THE COURT: I think, Mr. Reporter, just for clarity, you might mark that, that little summary of mine.

(Reporter does so.)

Q Take the truth of my assertion, my recitations as being rue, recitation of the fact that on January 12--the 13, 1950, William Thompson, the patient whom you examined, was aboard the Rosina Marron owned and operated by the defendant in this action.

THE COURT: You don't have to give him a long hypothetical, sir, because counsel has stipulated his report in evidence upon the basis of information given the doctor and that answers the hypothesis.

MR. GLEASON: Yes, sir. In other words, Doctor, your report says that the blows on the head by the meat cleaver back there in January 13, 1950, are the producing cause medically, you will testify and have testified thereon, that they are the producing cause of the brain disease that you find that

the plaintiff has sustained, is (107) that right? A Yes.

Q Now, sir, will you also take as true the following: will you also take as true the following that while you were not in court the plaintiff testified that ever since about two years ago--no, let me say this, about two years ago he began to get hot and cold feelings with accompanying pain and that the pain in his face and head--that is, it has traveled down his face into his cheekbones and ear on the right side, and that that pain is of a different sort than he had directly after this accident or this assault; and that it is of a continuous nature, the pain, and that it disables him from doing work as cook because he cannot bear to be near the stove and he cannot bear to do the work of a cook and must take a position of less monetary return, and a lower position in rating on the ship, namely mess utility.

Now, can you tell us with a fair degree, can you give us your opinion with a fair degree of medical certainty as to whether the blow on the head is the cause of those symptoms that I have described--the blows on the head? A I can.

Q Will you? A I believe that, as I stated in my report, that (108) certainly the trauma that he sustained is in a large measure responsible for his present complaints.

THE COURT: Now, sir, let me interrupt this just a minute. You mentioned in there lues, you have that in mind in your answer?

THE WITNESS: Not in particular, the lues, sir, but more particularly the diagnosis of duodenal ulcer had been made.

THE COURT: Well, in your answer to the last question, you had in mind both the lues and the duodenal ulcer?

THE WITNESS: Yes.

Q What you have just stated to the Judge, I take it, Doctor, is, that you don't consider the lues as a contributing factor as much as you do the duodenal ulcer, is that right, sir? A That's correct.

Q Do you consider the lues a contributing factor to this patient's present condition? A Not at all.

Q Do you consider the duodenal ulcer a contributing factor, and if you do, sir, explain to the Judge just how much contribution you feel that the duodenal ulcer has made? A In the sense that a patient with duodenal ulcers may have a certain type of personality which predisposes (109) them to an anxiety state. I would say that the trauma in this man is much more likely to produce anxiety manifestations than in an individual who did not have the antecedent history of duodenal ulcer.

THE COURT: What you mean, I suppose, is this: that a man having duodenal ulcers, that constantly recurring pain is a bit irritated by them and--

THE WITNESS: Yes.

THE COURT: --and if he is a bit irritated by them, more pain is apt to irritate him more than the same amount of pain will irritate a normal person?

THE WITNESS: That is correct.

Q Now, Doctor, what do you mean by anxiety state, because I want to keep from repetition and I want you to explain to the Judge what an anxiety state is? A Well, an anxiety state is a particular behavior pattern which deviates from the normal in which the patient who is anxious is tense, he is apprehensive, he reacts more to a given stimulus than the normal.

THE COURT: I don't think he has to go into that. I have heard of them for twenty odd years.

Q Even at the expense of possible repetition--and I'll sit down very quickly if this is repetition, but Doctor will you take this set of facts as true, as testified to by the plaintiff?

(110) He says that he cannot sleep when he's shore-side and that, unless he is working until his body becomes very tired indeed, he fails to sleep. He says also that he wants to be doing something else, in other words, that when he is here he wants to be there.

THE COURT: He wants to get away from himself.

Q He wants to get away from himself, exactly. Seemingly he wants to project himself from the being that he is. If he's shore-side, he wants to be at sea, and if he's at sea, he wants to be shore-side, if he's here he wants to be there. Now, are those manifestations, Doctor, part of an anxiety complex or are they something else? A I would say they are part of a moderately severe anxiety state and if carried far enough these things vary in degree, of course--if carried far enough it may be evidence of a prepsychotic personality.

Q Now that's what I want to come to, what is a prepsychotic

personality? Is that the same thing as a traumatic neurosis?

THE COURT: You mean going into a psychosis, is that it?

THE WITNESS: It is more severe than a mild anxiety state.

THE COURT: It may grow into a psychosis?

THE WITNESS: Yes.

(111) THE COURT: All right.

Q And by the term psychosis you are entering into the realm of incurable diseases, aren't you? A Not all psychotics are incurable.

Q What are their manifestations? What would be a psychosis?

THE COURT: I don't think we need go into that, counsellor.

Q But at any rate, Doctor, these manifestations, that have been testified to by the plaintiff--could you give us your medical opinion as to whether or not they were caused by this assault?

A I believe they were.

THE COURT: Now let me interrupt one minute, Doctor, because I notice here in your report up at the top of the first full paragraph on Page 2 your allusion to these hot and cold flashes which in the context with the other words might indicate that he started to get them not in 1952 but in late 1950. Can you tell us whether or not he told you they were in 1952, or in

late '50?

THE WITNESS: It would be impossible for me to state whether this information is from the patient or from the hospital records.

THE COURT: Well, the record being there, I (112) suppose we can apply the process of elimination.

MR. GLEASON: Yes, sir.

Q Now, Doctor, I want to take you into the hospital records just a bit and I feel, Judge, that this might help, might save a lot of pouring over these hospital records by counsel. Doctor, do you remember in these hospital records whether, after his first hospitalization for this injury to his head when he returned to the hospital, especially the Staten Island Hospital, whether he made complaints of headaches and manifestations in his head? A At which hospitalization?

Q Perhaps I can help you (passing papers).

THE COURT: Do you want to ask him questions based upon those records, because if you simply want what the records show, and they can be stipulated in, you have got it.

Q Doctor, you have seen--you have looked over these records carefully and you have examined the patient and you have attended court and you have given us, to the best of your ability, your diagnosis. Now, Doctor, I wonder if you would go one step further and basing your answer, upon what you have found on your examination in these hospital records and what has been testified here in court

by the plaintiff that he has these continuous (113) headaches and pains in the side of his head and that he has these feelings of wanting to project himself from himself, would you give us the benefit of a prognosis on his case? In other words, what is his future likely to be medically and neurologically? A Well, I would say that since four years have elapsed the chances of this man's improving are quite remote.

Q And, Doctor, would you say that these pains that have manifested themselves almost or quite continuously to the right side of his head, would you say they are very apt to continue?

A Yes.

Q Throughout his life? A I believe so.

Q And would you say so also that this feeling of wanting to project himself, go some place else, do something else from what he is doing now, would you say, Doctor, that those feelings are apt to go on for any length of time? A My experience has indicated that if these symptoms do not disappear within a year or so following their onset the chances of spontaneous remission are under 10 per cent.

THE COURT: What can you do about it?

MR. GLEASON: That is it, Doctor, what can be done about it, if anything?

THE WITNESS: From the pure organic point of (114) view, very little, other than the use of such drugs as dexadrine or dexanil in an attempt to change the patient's mood. From

the emotional point of view, supportive therapy is about the best that one can offer this individual.

THE COURT: What do you mean by that?

THE WITNESS: Supportive in the sense the chance to talk these things out may help and he may dimish some of his anxiety after these psychotherapeutic sessions.

THE COURT: It is an attempt at best.

THE WITNESS: Yes.

Q Now, Doctor, is there any surgery indicated here?

A I don't think that any surgical intervention would improve this man's condition.

Q Is there any manifestation--are there any manifestations there leading you to believe that there is any pressure on the brain?

A No.

Q There is, in the hospital record, Doctor, if you will remember, a mention of encephalopathy. Is that right? A Yes.

Q What is encephalopathy? A Encephalopathy is just a broad term that means disease of the brain.

(115) Q That is one of the diagnoses of Stapleton Hospital, I believe, is it not? A I believe it was traumatic encephalopathy.

THE COURT: Coming from a blow?

THE WITNESS: Yes.

Q Doctor, encephalopathy has a lot more connotations than mere cerebral shaking up or anything like that, doesn't it?

A Well, encephalopathy can range from a minor injury all the way to a man who expires because of extensive brain damage.

Q I think the Judge asked you this question but my attention, I'm sorry, was elsewhere, so even at the risk of repetition I'm especially interested, Doctor, in these manifestations that he has, that he is not satisfied with what he is doing. He wants to be doing something else every ten minutes. Is that a permanent thing? What is the prognosis on that, Doctor? A Poor.

Q Poor? A Yes.

THE COURT: I understood the doctor to say that these symptoms which we have discussed all were apt to continue.

MR. GLEASON: Thank you, Judge. I didn't quite (116) get that. I think I will be through in just a moment.

Q Doctor, there was an operation performed, was there not, at Corpus Christi? A I believe so.

Q Now, would you just give us the benefit of your services a little more and tell the Judge what that was, if you remember. What was the nature of that operation? A I would have to refresh my memory with these records.

Q Now, Doctor, I think perhaps rather than having to go through the bunch of them, we have here the Corpus Christi records and perhaps it would speed up your--or make it less work for you-- A I am trying to find the exact operative note.

THE COURT: If you can give us in terms that we can understand, we will appreciate it.

THE WITNESS: From the records here it would indicate that this man had a laceration of the scalp that when the wound edges were separated two fractures of the skull were noted and that this fracture continued through the inner table as well as the outer table of the skull and that the laceration was then sewed up, and that was the operative procedure.

THE COURT: No depression?

THE WITNESS: The note here states no depression of fragments.

(117) Q What is the significance of the fracture being through the inner table as well as the outer table? A It just means that the entire skull was fractured, that is the entire thickness of the skull. There was dissolution of continuity through the entire thickness of the skull.

Q Does that have any bearing upon the present condition of organic disease of the brain? A The skull injury per se, no. In other words, you can have extensive damage to the skull with minimal injury to the underlying brain and you can have extensive damage to the brain with intact skull.

THE COURT: I suppose that would depend largely upon the durability of the skull?

THE WITNESS: That is one of the factors.

THE COURT: The thickness of the skull. If, for instance, you had a very thick skull and a blow that went through that thick skull, you would get a greater concussion to the brain

than if you had a blow which went through merely a very thin skull.

THE WITNESS: Yes, I believe that would be correct.

THE COURT: So that, assuming you had here a skull of good thickness and a blow that went through both tables, that would indicate a blow of great force and--

(118) THE WITNESS: Yes.

THE COURT: --and a blow of great force and violence would by mere definition cause more violence to the brain tissue.

THE WITNESS: Yes, sir, that plus the history of unconsciousness are factors in determining the severity of the damage to the underlying brain.

Q And, of course, you have testified that there was severe damage to the underlying brain, Doctor. A The man was unconscious for twenty or thirty minutes. He had a substantial injury to the brain.

Q Your present diagnosis is as per your report, I think, Doctor, that there is an organic disease of the brain. Is that right, sir? A Yes, I believe so.

Q And that was caused, if not by the fracture of the skull, it was at least caused, in your opinion, by the blows that were rained upon him that day? A I believe that.

THE COURT: What you call the coup or contra-coup--maybe you wouldn't. The concussion comes from either the

coup or contra-coup.

Q In other words, Doctor, when you have a contra-coup you can have a blow on the right side of the head that will go through and injure the brain on the left side, or (119) even injure the brain down near the base of the skull. Isn't that right, sir?

A It is quite a common occurrence.

Q And that is what they call a contra-coup and it would appear, Doctor, would it not, following out the thought of his Honor, that this blow was of such a character going through the skull, the outer and the inner table of the skull--was of such force that it could very well cause an injury contra-coup. Is that right, sir?

A It undoubtedly did because the man had an injury to the right side of the skull and following the injury he had weakness involving the right arm and leg which would mean there was damage to the left side of the brain.

Q That would be inevitable because you neurosurgeons know and you neurologists know, do you not, that when there is a paralysis of the right side or the right extremities that that means there had been an injury to the left side of the brain?

A That is almost universally correct.

Q And vice versa, where you get an injury to the right side of the brain if you do get a paralysis it will be in the left side?

A That's right.

(120) CROSS-EXAMINATION BY MR. HANRAHAN:

Q Doctor, was it your intention to indicate that the fact that

this weapon pierced two layers of the skull, that there was a severe brain damage resulting from this trauma? A No, I had just stated that you could have severe damage to the skull without any brain damage.

Q But the fact that the two electroencephalogram tests made at Galveston and at Stapleton indicated there was very little evidence of brain damage here. Is that correct? A Yes.

Q Now, going over your report I, with my limited knowledge of these neurological tests, it would seem to indicate that neurologically this man was pretty sound. A On gross organic examination he was all right.

THE COURT: How do you account for the fact that these encephalograms showed small brain damage and then you find--didn't he say small?

MR. HANRAHAN: None.

THE WITNESS: I didn't say anything about the encephalogram.

THE COURT: What did they show?

MR. HANRAHAN: May I read it to your Honor?

THE COURT: Yes.

(121) MR. HANRAHAN: I read here from the electroencephalographic report: "Requested by Dr. Warnoch, taken April 19, 1950, placement of electrodes. Electrodes were placed over the frontal, parietal, occipital and temporal areas. Common indifferent electrodes were placed on the lobes of the ears.

Monopolar and bipolar recordings were taken." And then he sums up: "Impression, normal record with evidence of increased emotional tension."

Q With respect to any further questioning, would this be an accurate statement, that whereas your neurological examination was fundamentally normal, your conclusions were that this man was suffering from an anxiety state which you felt fell into the psychoneurotic class? A No.

THE COURT: I don't know as you could say, "fundamentally normal." While they may have been functionally normal they show an increased emotional tension.

MR. HANRAHAN: I meant to say what you found principally wrong with this man was that he was complaining of hot and cold flashes on the right side of his head and--

THE COURT: I think my statement is wrong. I think what you read there, counsel, showed that this brain at that time was organically about normal but functionally disturbed showing increased emotional tension. (122) Isn't that right?

THE WITNESS: That is right.

Q Yes. In other words, all the mechanical tests you neurologists have show knee jerks and tests--you got a normal reaction? A Yes, but you must understand that these are crude tests, otherwise there would be no need for all the other things we have to deal with.

Q What I want to get down is how this functional disorder

was manifested to you. That was by the man claiming hot and cold flashes on the right side, plus headaches, plus anxiety state. Is that right? A Yes, I feel he has a combination of organic disease and functional or emotional disease.

Q When you got into the definition of psychoneurotic I don't think I quite followed you there. Was it to indicate that sometimes you have a psychoneurosis due to trauma and other times due to other disorders? A Yes, not all, sir. Not all psychoneurosis are related to physical trauma.

Q And if this man had evidence of psychoneurosis before the trauma, would that influence your decision at all? A Yes, that is what I stated in relation to the question of his having a duodenal ulcer. Anybody who has pain is perhaps more prone to formation of an anxiety state.

(123) Q When you were given all these medical records to come to a conclusion, was it brought to your attention that he had been observed for psychoneurosis prior to this in the Marine Hospital? A I only read the records that were given to me and--(looking through papers).

Q The record here of Staten Island, January 20, does that bear a notation that some observation was made for psychoneurosis? A Well, the diagnosis there is aerophasia and hyperemia of the larynx and RO means rule out psychoneurosis and gastric malignancy and recurrent ulcers. In other words, what you're reading here is a physician's thoughts about the various possibilities but he--

Q He considered it at that time, though. A Oh, yes, you consider a lot of diagnostic possibilities.

Q When you examined this man did he give a history of headaches prior to the accident of January, 1950? A I don't recall. I don't recall any such history. Maybe.

Q I show you a record of 1948 from the Staten Island Hospital and I ask you to read those symptoms pertaining to the head. A Headaches almost continuously for three weeks frontal and left temple, jumping, helped by cold and wet towels.

(124) THE COURT: When is that?

MR. HANRAHAN: 1948, two years before the accident.

MR. GLEASON: May I ask one question on the record as to that? What was the diagnosis upon that visit? Was it duodenal ulcers?

THE WITNESS: Cystitis and duodenal ulcer and then the possibility of a conversion hysteria.

THE COURT: Of a conversion hysteria? What does that mean?

THE WITNESS: That is an emotional disturbance where there are somatic complaints without the patient's wilful knowledge being present, without any organic explanation. In other words, hysterical paralysis would be a possibility of somebody so emotionally disturbed that they cannot move the leg yet there is no organic explanation for that, but they have the note here that that diagnosis is not confirmed. The diagnosis on which

the man was signed out was duodenal ulcers.

Q Let me ask you in connection with conversion hysteria, would you say that a man who had been torpedoed three times would be subject to that--possibly subject to that? A If he had an anxiety it should be manifest, you know, about the time of the incident.

Q Of course I have not had a chance to cross-examine (125) the plaintiff yet but would you just read from this history of the record in Galveston in April of 1949? A It states here he was torpedoed three times during the war in the Mediterranean, Atlantic, Persian Gulf.

Q What I'm getting at is, that is a man with the anxiety state you would expect in a person subject to ulcers; a man who has shown, has had these records of headaches prior to the accident; a man who has gone through the experience of being torpedoed three times could show an anxiety state similar to the one you found in this man and with the complaints of headaches that he claims he has even if such an assault had not taken place. Is that not so?

A I think--

Q I am not going to try to trap you. I don't want you to say that this is due to something before but it could have been even if he did not have such an assault. A I stated that very clearly it is quite obvious that the man has marked anxiety state and I feel, in a large measure--I'm not saying this particular episode in 1950 was the sole responsible cause for his present disability.

Q Tell me--

THE COURT: What you mean is, Doctor, that given a man with these prior headaches, torpedoings, and possible anxiety state, the chances of this contra-coup (126) bringing forth this end result are increased?

THE WITNESS: Yes.

THE COURT: But you think that the end result is in the main due, not to the preexisting headaches, to torpedoing, et cetera, but to the coup and contra-coup?

THE WITNESS: I believe that.

Q Now, plaintiff has testified, as the Judge noticed, that he claims that these hot and cold flashes began in 1952. Now your report does contain a statement in the history that the patient states that in August, 1950, he returned to work in spite of the fact that he had episodes of pain in the right parietal region which he described as hot and cold flashes with radiations into the face, head and neck.

Now, on the basis of the way you worded that, doesn't that indicate to you that the man told you he had those hot and cold flashes sensations in his face when he first went back to work after this accident? A As I stated before, I don't know whether he told this to me directly.

Q You know how you phrase something.

A These records here, I went over the history here.

Q You also took a history from him. A Yes, so that--

Q If you say in your expressions, I mean you dictated (127) this to somebody and somebody typed it, if you say the man went back to work in spite of the fact--that means that he had those things at that time when he went back to work, doesn't it? A Oh, yes, the only thing I don't know is whether he told this to me or whether this came from the hospital record.

Q Somehow it was brought to your attention?

A Somehow it is there.

THE COURT: Let me ask you, Doctor. I think you said that this effort to escape from himself was a normal symptom of this anxiety syndrome.

THE WITNESS: It is one of the manifestations of an anxiety syndrome.

THE COURT: And would such a manifestation of such a syndrome manifest itself perchance when a man was ashore of desiring to go to sea?

THE WITNESS: Yes, most certainly.

THE COURT: All right.

Q As you know, this man went back to work, but as a matter of fact in July of 1950, and worked up until about January of 1951, when he went back to the Marine Hospital. From those records, Doctor, would you tell me what the diagnosis was for that period? A Duodenal ulcer and chronic urethritis.

(128) Q That was the principal reason he was admitted at that time, is that right? A Yes.

Q Now, if while he was in there, if he made a casual reference to headaches, I presume that would be somewhere in those records, too. A Well, a provisional diagnosis on admission is gastritis, psychoneurosis, possible psychosis, and the diagnosis on discharge was duodenal ulcer and chronic urethritis.

Q It will be borne out later in the records that, after being discharged from Staten Island in April, late April of '51, he went back to work until June of '51, when he went down to Baltimore Marine Hospital. A It says in my records that this hospitalization--I don't know what--I agree with the final diagnosis but it apparently--there is evidence of anxiety state with depression as one of the diagnosis in the hospitalization at that time.

Q In Baltimore?

MR. GLEASON: I want to be sure, Judge--I want to be sure the Judge hears you easily.

Q You are concerning yourself with which admission?

A The one we talked about, February, '51, to April, '51, at Staten Island, and I have a note here saying that complete examination at this time finally revealed evidence of an (129) anxiety state with depression.

Q But the principal reason for admission was stomach trouble and urethritis. A No, that's the final diagnosis. The reason for admission is the provisional diagnosis.

Q Have you worked at the Marine Hospital?

A I have been their consultant since 1946.

THE COURT: I could hear him very easily.

Q While I am looking at that, can you tell me first the first admitting record there if you're familiar with it? I just want to look at the Baltimore records. A The first admission?

Q The first admitting history that was taken.

A Well, let me explain the routine at the hospital. The first thing that happens is that this top sheet is filled out, you know, containing the name and all the other things. Then the admitting physician makes a tentative diagnosis which here is, "Upper respiratory infection, psychoneurosis?, possible psychosis," and then there is the discharge summary and this is the first history taken by the ward surgeon. He stated here, "Multiple complaints not clearly defined."

Q Would you continue reading that, please?

A "After the first few days of admission his anxiety state had subsided somewhat and it was brought out that a (130) local physician in Texas had told him he had tb. and heart trouble, the symptoms of which constituted his major complaints. Then on admission the patient complained of upper respiratory infection with hacking cough, blood-streaked sputum in small amounts of six days' duration. For three months he had been having palpitations, sharp left chest pain occasionally, constricting in character, substernum burning pain had been prominent with a hacking cough. Three days prior to admission, the whole left side had been, 'weak,' with localized areas of pain especially in the precordium and left upper quadrant." And this is the recitation.

Q You have read a whole page but we don't find any mention of headaches, do we? A No, there is nothing.

Q I am just pointing out to your Honor this was six months after--I would like to just hit some of these others, June of '51, when he goes to the Baltimore Marine Hospital. Is that the original record you would get from there? A This is an outpatient record, you know, outpatient record is rather incomplete.

Q Is it about pain in the ankle and legs?

A Blood in the urine.

Q There is no mention in those outpatient records of any headaches. (131) A I can tell you this from experience: if a patient comes in with bloody urine, you don't go through a complete detailed summary.

Q I can appreciate that. I think there is an actual--

A And the thing was "Undiagnosed disease of the kidney."

Q He does get admitted here, I think we'll find.

A Yes, this part is the hospital admission.

Q And that is a cystectomy, a pileography? A Yes.

Q That has to do with kidney trouble? A Yes.

Q This is a summary? A This is a summary.

Q Would you read that admission note into the record, please? A "The patient states that about two months ago he began to have pain in the small of the back, no radiation. Hurt when--also burns when he urinates--"

Q What I'm getting at-- A "Starts urinating pure

blood then is admixed."

Q I'm trying to point out that there is no record in the first part of the history or any record--

MR. GLEASON: What date is that?

MR. HANRAHAN: June of '51, about a year after he signed the release.

(132) Q Now, I show you these records from Stapleton Hospital, February, '52. Would you review them briefly and tell his Honor what the man was treated for principally at that time?

A. Duodenal ulcer, benign hypertrophy of prostate and condylomate acuminata of penis.

Q I won't bother you too much. Just these Baltimore, March of '52, to April, '52.

MR. GLEASON: I'm not going to object.

Q This is '52, and he claims headaches are hitting him.

THE COURT: I suppose the point is this, counsel, if you simply are showing these to the doctor, that is one thing; if you're going to ask him a question upon the basis of them--

MR. GLEASON: That is another thing.

THE COURT: Are you?

MR. HANRAHAN: Right.

MR. GLEASON: I don't want to object to it but I do press this query: aren't we taking text out of context? In other words, I have found in many of these hospital records--I pointed out to counsel this morning that I have found where he had complained of

pains in the head and headaches and everything like that.

MR. HANRAHAN: I would be glad to have him point it out to me.

(133) MR. GLEASON: There are those throughout, yet the pain diagnosis on discharge would be something having to do with urethra or something like that, in other words, but I'm not going to make any statement but I think the doctor should be given a question in regard to them so that if we're taking text out of context that the doctor may be giving us his opinion as to that. That is all I object to.

Q Doctor, did you testify to what the treatment in Baltimore in March and April, '52, was? A Postoperative status following transurethral resection of prostate.

Q Doctor, Mr. Thompson testified that while he was working continuously after he settled his case against the Rosina Marron up to the present time, with the exception of these periods of hospitalization, in spite of the fact that he says he's been plagued with excruciating headaches, would you not say that, as a physician, you would expect a patient to bring such headaches to the examining physician's attention when reporting to any of these marine hospitals? A Ordinarily, yes. Of course it depends on the complaint, it depends on the situation that prevails in the hospital. When you come in, for example, if the admitting physician who sees the patient quite briefly sees that the major (134) problem is a G.U. problem, prostate or kidney, the patient then is sent to the genitourinary service

and, as you well know, specialists are interested only in their particular field, so that it is quite possible that man might have complaints but physicians would be interested only in his particular field, it's possible not--

Q But in addition to headaches he complains about an inability to sleep unless he took certain pills or took pills for headaches. This man was admitted four months at a time at these various marine hospitals. If such pains persisted, or if such insomnia persisted, you would expect to find some record, some clinical record, would you not? A There might well be.

Q Doctor, there was another manifestation here of this man's anxiety state. I guess we could describe it as a relentless desire to always be on the move, to be bored in staying in one place too long. Would you say that is an ordinary characteristic or element of the personality of a man who had been going to sea for thirty years? A Again the degree; the point at which such a thing goes from normal to abnormal depends on degree.

Q You base a conclusion on some evidence here that this man had an anxiety state because he wanted to keep on the move. Is that correct? (135) I mean, the only way you could know about that is if he told you about that himself. A Yes.

Q Now, you have a man in your office giving you a certain history so that you can come to a conclusion about what is wrong, but is it unusual for a seaman who has been going to sea for forty years to display a tendency or desire to keep going somewhere, not wanting to stay in port for more than a couple of weeks at a time? Is that unusual? A I believe it is.

Q Has it ever occurred to you that seamen are at least unusual in respect to that they don't have the normal family, the normal staying in one place that you and I and other people in this courtroom have? A Certainly.

Q Is that unusual? A No. I appreciate, I well appreciate the fact that seamen have a somewhat different makeup than people who stay on land all the time.

Q Your examination here consisted of certain neurological tests, questions and answers, what you asked the man and what he told you, and your observation of a rather tense personality. Is that correct? A Yes.

(136) Q So, based upon this tenseness and what he told you about not wanting to stay in one place, that led you to the conclusion that he had an unusual desire to go from one place to another. Would that be a fair statement? A This is an oversimplication, much too much.

Q Could you tell us what else you did that led you to that conclusion? A The final diagnosis represents almost an hour with the patient plus three hours of going through these various records, and I don't think it's quite right to pick on any one individual factor. I look at this thing as a total entity.

Q But we heard him testify. It seemed to me he said nothing more than, that if I stay in one place too long I have to get on the train and go somewhere or I have to get a boat. Then he augmented that as a desire to keep going somewhere with headaches.

In other words, he would make two trips on a boat and then have to get off the boat on account of headaches. Was there anything else that he told you that led you to believe that this desire to keep on the move was unusual for a man that has been on the sea for forty years? A That, together with the fact that he has lost weight, that he has the headaches, that he has this particular type of pain, that he overreacts to stimuli, that he has this particular (137) background of ulcers and precordial pain. The whole thing together makes me feel that this man has a moderately severe anxiety state.

THE COURT: He was constantly changing ships.

THE WITNESS: I believe so.

THE COURT: It wasn't a case that he was going to sea but he was changing ships.

MR. HANRAHAN: I'll bring that out later.

THE COURT: That is what I understood.

MR. HANRAHAN: You mentioned here the past history was significant. He had a luetic infection in 1937. What do you mean by luetic infection? A That he had syphilis.

Q Were there any other records that indicated how long he had had it? A I mean I have no record of it in here.

Q You mentioned that he was treated for fever and infection. When you mentioned fever, is that the malaria treatment?

A Yes.

Q Is it not a true medical statement to say that the malaria treatment is only given in advance stages of syphilis where there is

some infection of the brain? A That is true. It is less true now than it was then.

Q I mean with penicillin and things we have today, you (138) don't have to? A That's right. In 1937, if you were desperate, you had nothing to offer the patient other than arsenicals, and it was generally conceded that if there was any question about the central nervous system imvolvement you always treated, and that was true not only of the central nervous system but if the Wassermann was doubtful, you always treated the patient whether you were sure the patient had syphilis or not because the potentialities were there.

Q What I'm getting at now from a syphilitic condition that had reached the proportions of brain damage if it had, would you find an anxiety state or schizophrenic state possibly following?

A No.

Q Even with organic brain damage following syphilis?

A Schizophrenic as a result of syphilis is an extremely rare thing. I mean, if we're talking about possibilities, anything is possible; if we're talking about probabilities, schizophrenic is not caused by--

Q How about an anxiety state? A No.

Q Simply as such? A No.

Q In schizophrenia you find--how shoud I put it--a (139) tendency to persecute anybody? A You may in some types of schizophrenia.

Q What are the principal characteristics of schizophrenia?

A Well, it depends.

THE COURT: Divided personality, Doctor.

THE WITNESS: That is the broad loss of contact with reality.

THE COURT: I said divided personality.

Q I want to ask you something about procedure at the marine hospital. Mr. Thompson has testified here that despite his treatment at Corpus Christi, New Orleans, Galveston, Stapleton, for head injuries, people would deliberately not tell him what was wrong with him. Is that standard procedure at marine hospitals?

A No, sir.

Q You notice that after June or May of 1950 treatment, he was sent out with one month's convalescence. Would you say, with your familiarity with procedure at the marine hospital, that this man was given a pretty good idea of how he stood, is that right?

A I believe so.

MR. HANRAHAN: That is all.

THE COURT: Doctor, let me ask you a question: I presume that a man with an anxiety syndrome because of his anxiety sometimes lets the anxiety augment his own (140) belief of his own difficulty?

THE WITNESS: There is no question about that.

REDIRECT EXAMINATION BY MR. GLEASON:

Q Doctor, this malaria treatment that used to be given for syphilis, that was originally given as a prophylactic, wasn't it?

A I wouldn't say prophylactic but if there was the slightest

question, it was given.

Q In other words, it was given sometimes in anticipation of perhaps the syndrome of syphilis. What I am saying is, there didn't have to be brain involvement in all cases where they gave the malaria treatment. That is so, isn't it? A Yes.

Q It was given quite often in the old days, wasn't it?

A Yes.

Q Now, Doctor, just for example for his Honor, text out of context, you have been shown the admission notes and discharge notes in February-more particularly, around the middle of February of 1951, in your own hospital, the marine hospital. Now, I don't believe that there was much said about brain damage or anything like that.

MR. HANRAHAN: I object to what he said. The first admitting officer there was quite clear about that.

Q Doctor, I point out to you in the progress reports (141) this--he was subsequently hospitalized at this facility 4/9/50 to 4/28/50, and the neurological workup included skull fractures and E.E.G. A E.E.G.

Q What is that? A Electroencephalogram and found to--

Q And found to be normal. However, he was signed out as having encephalopathy due to trauma. Now I get to the point I want to make. It says here after that "he complains," that is in the present tense, "he complains of continued pain in the right parietal

region." Now, parietal region is the skull, of course, isn't it? A Yes.

Q "Flashes of light laterally to the right eye, fullness and pain in the left side." Of what is that? A Neck.

Q Ever since that time? A Yes.

Q Now the hospital had the benefit of that, didn't they, in their work? A Oh, yes.

Q Now, Doctor, you said, in your prognosis to the presiding Judge here, you said that there was not much that could be done right now for this man. A That is true.

(142) Q Now of course, Doctor, you must--not must--will you give us, as your opinion, the fact that that was in the minds of these treating doctors at these different marine hospitals--

MR. HANRAHAN: I object to that, that is impossible.

Q --when they saw this gentleman from time to time?

THE COURT: How could he tell what was in their minds?

Q May I ask this: when someone comes to a marine hospital or any hospital with a condition that you cannot do much about, you will try to do something about the other things that are the matter with him. Is that right, sir? A Oh, yes.

Q In other words, if I had an encephalopathy due to a trauma which was to the extent so incurable that you could not do much for me and I came with a duodenal ulcer, you wouldn't put me out of the hospital merely because you couldn't do something for me for the encephalopathy? A You would tackle those parts of

the total picture that you could do something for.

Q Now, would you give us this opinion after reading these hospital records, that when he went in there from time to time there is nothing in these hospital records (143) that shows that he did not have the headaches, is there? A No.

Q And there is nothing in these hospital records that shows that they were not aware of that? A No.

Q Do you think it was good medical procedure to go ahead and, in spite of the fact that they couldn't do much for him for his head, to go ahead and heal his body as much as they could?

A There is no question about that.

MR. GLEASON: I think that is all, your Honor.

MR. HANRAHAN: No further questions.

THE COURT: Recess until 10 tomorrow morning.

Did you check on something you were going to check on?

MR. HANRAHAN: You mean on the records?

THE COURT: I guess you did.

The plaintiff wants to say something, counsel, you better talk to him.

[Adjourned to March 2, 1954, at 10:00 a.m.]

(144) Newark, New Jersey, March 2, 1954, 10:00 a.m.

[Trial resumed pursuant to adjournment]

Appearances:

[Same as previously noted.]

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MR. HANRAHAN: Your Honor, with the consent of my opponent I would like to interrupt the plaintiff's case to put a doctor on the stand, and if your Honor please would permit me, I would like about ten minutes to talk to him, I have never met the man before. Would that be possible?

THE COURT: I suppose so. Meanwhile counsel now have a better idea of about how long the remainder of their case will take.

(At this point there was a discussion as to the length of the case.)

C H A R L E S E . F A R R , called as a witness for the defense, duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HANRAHAN:

Q Doctor, you are a licensed physician of the State of New York? A Yes, sir.

Q Would you state your experience for the record, what schools you attended, your specialties, and what (145) hospitals you are connected with. A I graduated from Yale University and Yale University Medical School in 1903 and was for three and one-

half years intern and resident in New York Hospital and St. Mary's Hospital for Children. From that time until the present, I have practiced surgery in New York City. I became president of the Medical Society of the County of New York, professor of clinical surgery in Cornell University Medical School, attending surgeon at New York Hospital, director of surgery at St. Mary's Hospital for Children, member of the Yale Alumni Board representing the Medical Department, a founder member of the American Board of Surgery, a member of the New York Surgical Society. I now do my own private practice only.

Q Doctor, in May or June of 1950, did you have occasion to examine the plaintiff in this action, William Thompson? A I did.

Q That was at the request of the shipowner's claims bureau, wasn't it? A Yes, sir.

Q And Mr. Thompson came to see you and I imagine you took a history. A Yes.

Q And to be brief he told you he had been hit over the head by a meat cleaver by another seaman back in January, (146) 1950, is that right? A Yes, sir.

Q Will you tell us what complaint the man made to you and, if you want to refersh your recollection from your early report, go right ahead? A Mr. Thompson said that he had some pain and queer sensations in the scalp, on the right side of his scalp, and flashes of light in the right eye and along the side of the head. He stated he was taking pills for his nerves but his strength was all

right. That was his complaint.

Q And you made an examination, did you? A I made a quite complete physical examination at that time.

Q Will you tell us exactly what you did, Doctor?

A I got his height from himself and then I weighed him and watched him walk around and I had him strip and I did a test of his blood pressure and took his pulses in both arms and tested him for his reflexes. Then I examined the side of the head where the cut had occurred and I had x-rays taken.

Q What did they indicate? A They indicated a fracture of the right parietal bone, a vertical fracture about four centimeters in length.

THE COURT: By "vertical", you mean fore and aft?

(147) THE WITNESS: No, I mean up and down, Instead of being horizontal it was vertical on the side.

THE COURT Depressed or not?

THE WITNESS: Not depressed.

Q Was there any way you could tell from x-rays or examination that you made the seriousness of the fracture, that is, the extent of depth or anything of that sort? A No, it didn't penetrate to the train or meninges so far as x-rays show.

Q What conclusions did you come to as the result of this first examination? A I came to the conclusion that he had a fractured skull and very considerable nervous shock and that he had made a remarkably good recovery.

Q As a result of your examination, did you consider whether or not he was able to resume work, or did you fix a further period of convalescence? A I advised a further period of convalescence.

Q What was the date of that examination?

A The date was May 18.

Q How much convalescence did you prescribe?

A I would allow three months further disability, that was my estimate.

Q Until about August? A To about August, yes, sir.

(148) Q Than a what? A Then a 10 per cent permanent disability.

Q What did that 10 per cent mean? You felt he would have continued pain or headaches? A I was allowing really for nervous shock more than anything else, nervous shock and, well, memory of what he had been through.

Q Now, Doctor, of course this examination was in 1950. Now about a month or five weeks ago I sent you quite a bit of hospital data on this man, is that right? A Yes, sir.

Q Do you recall? A Yes.

Q I asked you to give these hospital records considerable study which you did. A Yes.

Q These records not only concerned hospitalization following the accident of January, 1950, but went back to 1947. Is that correct. A Yes, sir.

Q And then some time last week, I think it was, you had a second examination of this man. Is that right? A Yes, sir.

Q What were his complaints at this examination?

A Almost identical with the previous ones, a little (149) different wording about the hot and cold, but they were about the same as they were originally. This time he spoke of hot and cold sensations in his wound.

MR. GLEASON: He didn't before?

THE WITNESS: I have no recollection except there were sensations, abnormal sensations and complaints.

Q Did you make another physical examination?

A I did.

Q Will you tell us about that? A I weighed him and got his height again from himself and had x-rays taken and I had him strip and watched him walk and put him through a lot of motions and manipulations, lean over to the floor and coming back, I tried all his reflexes and took his blood pressure. I made a quite complete physical examination.

Q What conclusions did you come to? A I came to the conclusion that he had made a very remarkable recovery, that he was in very good physical condition for a man for his years who has been through all of the many sicknesses, illnesses that he has had.

Q Before I go into that, what, in your opinion, can you tell us about his ability to work? A I think he is able to carry on his usual duties.

Q Now you mentioned a man who had done remarkably well for the years he had and the number of sicknesses he had (150) had. I wish you would go into that a little bit further with the Court, particularly with respect to sicknesses and diseases you found evidences of in all these medical reports I submitted to you.

A He has had a great many sicknesses, two of which are extremely important. One is cerebral spinal syphilis for which he received treatment known as the malaria treatment, that is, he was given artificially induced malaria and then treated in the usual fashion of the years ago with salvarsan, bismuth and I think mercury, I'm not sure. That is the underlying cause of his central nervous system troubles. Then he had a serious ulcer of the duodenal which he still has and he has had symptoms of it off and on for many years. This is an evidence of his nervous tension of years' standing. Then he has been torpedoed and was unconscious for several hours. He had an old injury to his head, we don't know anything of the nature of it.

Q What evidence was there? A There is a reference to it in these old histories. He had a scar on the top of his head long before this accident.

Q In what vicinity was that? A It said on the vertex, on the top of his head, it didn't specify it too carefully.

(151) THE COURT: No fracture?

THE WITNESS: No fracture that is mentioned.

THE COURT: Well, you had the x-ray.

THE WITNESS: Well, we don't know anything about the

old injury, sir.

THE COURT: In other words, you didn't cover that on your x-ray?

THE WITNESS: It shows no fracture now.

Q Did you take x-rays last week? A I had them taken for me, yes.

Q Was there any evidence of fracture of 1950 in those x-rays? A Opinions differ very much. I didn't think there was but the man who took the pictures for me said there is still a faint line of a vertical fracture.

Q In other words, the healing-- A The healing has progressed, according to the x-ray experts, it has progressed quite satisfactorily but not completely.

THE COURT: Let me ask you, Doctor, as you looked at that skull did it show a skull perhaps like yours or mine or perhaps a little thicker?

THE WITNESS: It's much thicker than yours or mine, sir.

Q Doctor, what can you tell us about the relative physical condition of Mr. Thompson on the basis of your (152) examinations of 1950 and 1954? A I think he is rather better in 1954 than he was in 1950.

Q Would you enlarge upon that? A Well, in the first place he is a little bit off on his weight which I think is an excellent thing as a man gets past sixty. He is 196 pounds now

where he was 206 at my original examination. Blood pressure runs about the same, which is remarkably good for a man who has continued hard work for many, many years as he has and has been through all the troubles that he has been through.

Q With respect to his complaints about headaches radiating from the face and neck and hot and cold flashes that he talked about, now is there objective evidence of their being more severe or--the pain more severe?

MR. GLEASON: I object to that because--it's the first and only objection I've made but the Doctor stopped in his examination and answered a question for me, it was pinpointed that he didn't complain upon his first visit to Dr. Farr about these hot flashes down his face and all and his head. Now counsel asked him a question that connotes that he did. I don't think that is proper.

THE COURT: No, he doesn't ask him about flashes at all now, he's talking about objective not subjective.

(153) Q In other words, I'll rephrase it. If the man made complaints to you in 1950, and made complaints again to you in 1954, on the basis of both examinations, their objective evidence, can you come to any conclusions as to whether or not the pains were more severe in 1954 or not? A There is no objective evidence.

THE COURT: Let me ask you, Doctor, do you or do you not think that he is faking as to these hot and cold flashes?

THE WITNESS: Well, faking to me implies malingering,

a definite--

THE COURT: That's exactly what I mean. I'm asking you the question.

THE WITNESS: No, I don't think he is faking, I think he has been through a very severe nervous crisis and he had symptoms at the time that I saw him originally, and I think the same symptoms are renewed. I think they are mental but not faking.

Q Let me ask you another question with respect to his mental state. The doctor has testified yesterday that he has gone through an anxiety state. I imagine an anxiety state, as you pointed out, would follow the shock of this accident, is that correct?

A That's right but he had the anxiety state long before (154) this accident, too.

Q Is it possible for you to answer with reasonable medical certainty just how much this anxiety state that he is experiencing now is attributable to the accident of 1950 and how much to the torpedoing, the syphilis, the duodenal ulcers that you spoke of? Is there any way that you can answer that? A All I can say is, it's an additive factor, he has had a great deal of trouble.

THE COURT: What is an additive factor?

THE WITNESS: This trauma he had in 1950, that is added to all his previous difficulties. He is separated from his wife, he has lost his four children, he has had many, many attacks of veneral disease which shows he is looking for

something all the time which he doesn't get, no satisfaction in life.

Q On the basis of your two examinations your conclusion is that he is in better shape in 1954 than he was in 1950?

A Slightly better than he was in 1950.

THE COURT: But, he says, as I understand it, that the trauma in question was an additive factor.

MR. HANRAHAN: There is no question. If you get hit over the head with a meat cleaver, you're going to have something.

THE COURT: All right, that clears the air a (155) good deal. In other words, counsel, talking legally, with an additive factor, other causation, et cetera, existing, we have responsibility, the amount of that responsibility, of course, is another question.

MR. HANRAHAN: I think it is impossible--there is just one question.

Q You did not inform Thompson of your findings or finding of that sort, did you? A No, sir.

Q You were hired or retained--I don't like to talk of hiring you--you were retained by the shipowners to make a report to them, to help them price the value of this case? A Yes, sir.

Q And you didn't tell him anything about what you found?

A No, sir.

THE COURT: Doctor, are you a general internist, neurologist, or what?

THE WITNESS: I am a surgeon, a general surgeon.

CROSS-EXAMINATION BY MR. GLEASON:

Q Doctor, are you a neurologist? A No, sir.

Q Neurology is a highly specialized field of medicine, is it not, Doctor? (156) A Yes, sir.

Q And those who practice--

THE COURT: May I interrupt a moment and ask counsel, was this the doctor whose name Thompson did not recall but who examined him shortly before he signed the release?

MR. GLEASON: Yes, sir.

MR. HANRAHAN: Yes, sir.

THE COURT: Proceed.

Q While that is fresh in your mind I want to talk about that. You have already testified, have you not, that you didn't discuss Thompson's ailment with him at that time? I don't mean the other day when I was in the office but back there when you examined him in May of 1950, something like that. You did not discuss his ailments with him, did you? A Oh, yes, he had to tell me his story.

Q Well, did you say to him-- A And I had to question him very carefully as to what his symptoms were, what his ailments were.

Q Did you tell him what you put in your report, that he had a 10 per cent disability? A No, sir.

Q Did you tell him, Doctor, that these headaches were

liable to last for the rest of his life? (157) A No, sir.

Q They are, aren't they? A That is an impossible question to answer. He had headaches long before the accident. All men have headaches at times, nobody can say whether he has a headache now or will have in the future.

Q Do you disbelieve him, Doctor? I'm going to ask you the same question the Judge has asked you.

THE COURT: He answered that question.

MR. GLEASON: All right, sir, I'll go on then, your Honor.

Q Now, Doctor, in the report, in the hospital report I'm going to show you, just one part of the hospital report and that was the diagnosis when he was discharged from the hospital on April 28, 1950. Do you want the full record? A No, I just want this (looking).

Q Did you see that the diagnosis was encephalopathy due to trauma? A I have seen it since, I don't know that I saw it at that time.

Q You have seen it since? A Yes, sir.

Q Well, Doctor, do you agree? You examined him rather soon after the accident. Do you agree with the diagnosis (158) of the marine hospital that he had encephalopathy due to trauma?

A I would have to qualify that. I think the encephalopathy dates way back of this trauma but I will say this was an additive factor.

Q What is encephalopathy? A It covers everything

inside the head; everything that is abnormal inside the head is encephalopathy.

Q It's more than just nervous shock? A Well, nervous shock would come into it.

Q Well, you testified before that you found when you examined him the first time some years ago that he had severe nervous shock. Is that right, Doctor? A I testified that it would be a severe nervous shock to get hit with a cleaver over the head and get a fractured skull. I can't say he had it because I wasn't there but I know it would be true.

Q Did you find any signs of severe nervous shock in the patient? A Not when I examined him, no, sir.

Q No signs whatsoever? A No, sir.

Q Do you attribute or do you not attribute this desire of his to project himself some place else all the time--don't you attribute that somewhat to trauma with a meat cleaver? (159) A I can't tell what the man was desiring.

THE COURT: As I see it, counsel, the only difference in substance between what the Doctor says and what the hospital says, is that the Doctor thinks that these preexisting diseases have a somewhat greater effect upon the present condition than the hospital does. The hospital says that the condition they found is due definitely to the trauma. The Doctor says he thinks these preliminary diseases had a very great effect upon his present condition but that the trauma is an additive factor.

Isn't that about it, Doctor?

THE WITNESS: That is it exactly, yes, sir.

Q Doctor, you found in your latest report, at least you so stated in your latest report, that there was no remaining evidence of venereal diseases except some scars. Is that right, Doctor?

A That is true. No external evidence, the scars from the old troubles. I couldn't tell, no one could tell, whether there was any active venereal disease.

Q Now, Doctor, you have looked at these hospital reports prior to the time in question, that is, the time of his cleaver assault, and will you point out in those hospital reports wherein you base your assertion that there was any other cause for his present condition? (160) A It would take me hours to go through the hospital records but I can say this--

Q Didn't you point them out or did you point them out in your report, Doctor? A I didn't have them at that time, at the time I made that report.

THE COURT: In your last report.

THE WITNESS: No, sir.

MR. HANRAHAN: You mean the medical report?

THE COURT: Any report.

THE WITNESS: I didn't have the advantage of all these records, I didn't have time to study them. It took me hours after I had sent in my report to finish all these hospital records.

THE COURT: Let's see if it doesn't come to this: the

man told you some history, Doctor--Doctor, if I may have your attention?

THE WITNESS: Yes. Excuse me.

THE COURT: The man told you some history that showed he had some preceding disease before any of these hospital reports and before this particular time. You found in the hospital reports certain of these diseases, lues, ulcers, et cetera, whatever was there, either from what he told you himself of these preexisting diseases or from the hospital reports which alluded to these diseases (161) that made you think that those diseases were causative of his present difficulties as distinguished from the trauma.

THE WITNESS: There were many factors, your Honor. I think it is very--

THE COURT: There were the factors, there were the diseases that might perchance cause the anxiety syndrome but what was there?

THE WITNESS: There were many of them.

THE COURT: Which made you think--

THE WITNESS: May I enumerate them?

THE COURT: No, I have them in mind. You see I have been sitting in this case. What was there, from what he told you of how he was as a man before the accident, what was there in the hospital records of the aftereffects which made you think that those diseases, in fact, caused the anxiety syndrome?

THE WITNESS: It is my impression that he told me that he had separated from his wife and he had lost his four children. I thought that was quite an important factor.

THE COURT: That doesn't give a man an anxiety syndrome with hot and cold flashes on the side of his head, does it?

THE WITNESS: It could very well, sir.

(162) THE COURT: Hot and cold flashes on the side of his head?

THE WITNESS: It could , entirely apart from any trauma.

THE COURT: It would be a bit unusual, wouldn't it?

THE WITNESS: I don't know, I think not; I think a man who has been through such troubles as that could get symptoms on any part of his body.

THE COURT: It is a possibility.

THE WITNESS: It is a strong possibility.

THE COURT: Do you think that every separation results in hot and cold flashes on the side of the spouse's head? You don't mean that, do you, Doctor?

THE WITNESS: I certainly believe that a man who has been through that experience can have hot and cold flashes on any part of his body.

THE COURT: I can agree but do you think it's probable, Doctor?

THE WITNESS: Well, it's not a necessary consequence.

THE COURT: Well, let's not you and I get on each other, I know a lot of friends of yours, Doctor. Dr. Martin, your successor as the head of the New York Medical Association, and so on. You don't think that hot (163) and cold flashes normally arise from domestic separations, do you?

THE WITNESS: I think it does not necessarily follow but it certainly does happen.

THE COURT: Thank you, Doctor. I'm not interested in bare possibilities.

THE WITNESS: I have not answered the rest of that question, I would like an opportunity to.

Q Doctor, what I would like to know is this: with all the possibilities as you say of a separation from one's wife and even from four children, causing continuous pain in the side of the face and hot flashes and brain flashes and light flashes in the eye, Doctor, there is no doubt about this fact, is there, that when Thompson was struck by this cleaver--let's have it--feel that cleaver, Doctor, and that is lighter than the one in question--smaller, excuse me. You see the edge of that cleaver, Doctor? You felt the heft of it, didn't you? A Yes, sir.

Q There is no doubt in your mind that when he was struck twice or three times on the head fracturing his skull, that is, according to your testimony, very much thicker than perhaps ours, fracturing it right down to the brain; there is no doubt about this fact, is there, Doctor, that there was--

(164) A About that last statement, sir, in the hospital records and any examination that I have by x-rays, there is no evidence that it was down to the brain.

Q All right, have it your way, but there is no doubt about this fracture, that when he was struck twice or three times by that cleaver it set up a condition in his brain that led to brain disease, isn't that right, Doctor? A Oh, no, I wouldn't agree to that.

Q In other words, you say that when the hospital here says encephalopathy due to trauma, that they are all wrong?

A I wouldn't say they are all wrong, I would say there are some encephalopathy but I can't say that the fracture was the origin, or the trauma of this blow or blows is entirely the cause of the encephalopathy.

Q Have you ever heard of coup and contra-coup?

A Yes, sir.

Q There was contra-coup here, wasn't there?

A There was one statement in one of the records barely mentioning the word contra-coup.

Q I don't care about mentioning it, Doctor--

A How am I going to know?

Q I'll tell you how, I'm going to tell you how. You can know just the same way we all knew in this courtroom yesterday. Now, Doctor, isn't it inevitable that when the brain is damaged on the left-hand side it is just (165) opposite, isn't it, inevitable, Doctor, that when there is paralysis on the right-hand side of the

body--

THE COURT: The right members.

Q The right members it is the result of brain damage on the left-hand side? A Not inevitably, no.

THE COURT: Probably.

THE WITNESS: It is probable but it can occur the other way.

Q It occurred here that Thompson had some paralysis at one time. A A slight weakness.

Q Isn't that paralysis? A No.

Q Didn't you read that he couldn't take his fingers away from his other fingers? A I read that. I read that he had this same condition long preceding this accident at the time that he couldn't separate his fingers.

Q You did read it at that time. He couldn't separate the fingers of his left hand. A Momentarily, that is also preceding the accident.

Q I didn't ask that. Didn't that connote to you some contra-coup there, Doctor? A No, sir.

(166) Q None at all? A No, sir. I think that is very definitely an evidence of hysteria.

Q Would you read out contra-coup when a weapon of that kind comes down twice or three times on the right-side of the man's head?

THE COURT: Of this man's head.

Q That's right, because this man's skull as it was, and this weapon coming down two or three times hard enough to fracture it--would you read out contra-coup? A I would have to have proof. I can read it into anybody any time, anywhere, but I have got to have proof.

THE COURT: Now, counsel, it's simply a question of degree and it's very difficult when medical men deal in differences of degree as to a subjective matter to expect them to fully agree on the difference in degree.

May I see the original report?

A This is a copy of the original, May 20, 1950.

Q In that first report of yours, Doctor, I think it was worded, I have it here someplace.

THE COURT: At least we all agree to this, don't we, Doctor, that we're all regretful to find that your diagnosis in May of 1950, of a three-month disability with 10 per cent permanent, did not work out? We all agree to that.

(167) MR. HANRAHAN: Did not work out?

THE WITNESS: I can't agree to that, your Honor, I think it worked out very well.

THE COURT: Doctor, just a minute. You have told us that you believed he did have these hot and cold flashes. They are disabling to a certain extent, aren't they?

THE WITNESS: I wouldn't think so, no, sir.

THE COURT: You don't think the man today is disabled

in the slightest, is that it?

THE WITNESS: I allowed him 10 per cent permanent disability.

THE COURT: I am talking about today.

THE WITNESS: Well, permanent I said, Your Honor, that is today, that will be the rest of his life.

THE COURT: You don't consider that the man is disabled at all from working at his regular position which was cook over a hot stove as compared with dishwasher which he is now doing--you think he is just fooling?

MR. HANRAHAN: Your Honor, I seriously dispute that. This man has admitted to me in his examination before trial sailing in higher ratings than he ever sailed in prior to the injury.

THE COURT: That interests me. I understood from him yesterday--

(168) MR. HANRAHAN: He has not been cross-examined.

THE COURT: All right, I understood, Doctor, yesterday that he found when he was working over a stove that he just got these symptoms with such vigor that he couldn't stand it and that he, therefore, had to quit the job of cooking and became a dishwasher or something like that, a messman. Now, don't you think that he therefore has a disability or do you think he is just fooling himself?

THE WITNESS: Well, there is something in between,

your Honor, between having a definite physical disability and fooling yourself. I think that he is worried about himself, he is what they call a split personality, as all of us have at times. We feel we are wonderful, we can do anything, and at times we feel we can't, and there are times he probably feels he cannot do his work.

THE COURT: And you think that is what leads him to go to work at sea as a dishwasher rather than a cook?

THE WITNESS: I don't know about his work.

THE COURT: Have you ever been to sea, Doctor?

THE WITNESS: Well, I have never been to work at sea.

THE COURT: The cook has quite a post aboard a vessel, hasn't he?

(169) THE WITNESS: I would presume so. I can't speak from knowledge.

Q You know that even if you are just a passenger,

A I would presume he has a very definite position.

THE COURT: I imagine the Doctor has been a good, domestic man and has probably helped his wife wash dishes but not cook.

THE WITNESS: I have tried to cook, your Honor, without success.

THE COURT: All right, you then know there is a difference.

Q A cook, whether aboard vessel or if he's in the home, is

quite catered to especially if he or she be a good cook.

A Yes.

Q And a dishwasher is not. A Well, I am a dishwasher, I don't like to be one.

Q So am I and it's nice to wash dishes at home but aboard ship a dishwasher is a lowly position, isn't it, it must be.

A Yes.

Q And you think he is fooling himself, you think he is--

THE COURT: He doesn't say he is wilfully fooling himself, he says there is something inside him (170) that makes him think he cannot do it, whereas, in fact, he could do it. Isn't that it, Doctor?

THE WITNESS: That is a pretty fair statement.

Q Doctor, that is what you call conversion hysteria, isn't it? A That is a big word and I am not sure that is conversion hysteria.

Q It has something to do with the brain when a man says I can't do a thing and we all know he can, that has something to do with his brain. A That is more his soul and will power than it is his brain.

Q It has something to do with his brain.

A Not his physical brain, no, sir.

Q His psyche? A His psyche.

Q And that psyche can be damaged by trauma, can't it?

A Oh, yes.

Q That is what you call traumatic neurosis where a man's psyche is damaged to the point where his personality is different, where he doesn't do things that he might do, and thinks he cannot do them. That is what we call damage to the psyche, isn't that right, Doctor? A I think that is excessive but I think there is some truth in that.

(171) Q And it is well within the bounds of possibilities, isn't it, Doctor, that these blows or that meat cleaver might have brought about or did bring about damage to this man's psyche so that he thinks when he's over a hot stove he should not be over a hot stove, he should be washing dishes? That is right, too, isn't it, Doctor? A That could be.

Q And it is well within the bounds of possibilities that damage to that psyche brought about by these blows could make a man feel, when he is sitting where you are, that he wants to be in back of the courtroom, and when he is sitting there, he wants to be over in a restaurant, and when he is over in the restaurant, he wants to be someplace else, so that he cannot contain himself. That is damage to that psyche, too, isn't it, Doctor? A Well, I want to be in New York City right now but I don't call my psyche damaged.

Q But that is because, Doctor, you want to get back to your office there among people with whom you work and with whom you want to go on working.

THE COURT: When he gets there I don't believe he'll

want to get back here.

A No, I don't believe so.

Q But, Doctor, when you're in a different favorable position, drinking iced drinks or drinking beer and you (172) want to be some place else and the urge to be doing something else comes on, that is not nice, is it, Doctor? A It's not the nicest thing in the world but we can endure it.

Q That is one of the things you gentlemen of the medical profession know about and you pity in patients that you have.

A I wouldn't say I pity it, I overlook it.

Q You send them on sea trips, you send them to Arizona, you send them down to Florida to see if they cannot get rid of it.

A It is a disability.

Q Yes, it is a recognized and terrible disability.

A I allowed him 10 per cent permanent disability and I think that is very liberal.

MR. GLEASON: That is all.

MR. HANRAHAN: That is all. Thank you very much.

W I L L I A M T H O M P S O N , called as a witness in his own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Continued) BY MR. GLEASON:

Q Mr. Thompson, there was some talk of torpedoing. I want to cover these things just as they enter my mind. There was some talk of torpedoing. Do you remember, Mr. Thompson, ever

having had a vessel upon which you were (173) working or on which you were standing, torpedoed? A No. I have sailed from the beginning of the war, I have been near torpedoed, I have sailed on different ships. I got all my discharges and records. I have never been torpedoed.

THE COURT: Was there some torpedoing in the convoy nearby?

THE WITNESS: They had a ship torpedoed right in my convoy but mine was never torpedoed and I never told anyone that I was torpedoed.

Q How much education have you had, Mr. Thompson?

A Well, do I have to tell you that?

Q It is pertinent, it cannot hurt.

THE COURT: It cannot hurt.

Q I would the Judge to know as much about you as possible for the short time you have to live in the same courtroom with him. Just remember that Abraham Lincoln only had the education he gave himself. A Well, if you have to know, in my days there wasn't enough facilities for colored people in the south for schools and most all my education, I picked it up on the boats and going around.

THE COURT: I say then you are like Abraham Lincoln.

THE WITNESS: Well, if I was like him now, Judge, (174) I think I would be better off because he is resting and I am going around subject to die at any minute.

Q Now, Mr. Thompson, cheer up and let's live this life as cheerfully as we can. Mr. Thompson, have you ever been a drinker? A I have never drunk or smoked in my life. I will give you fifty dollars for a bottle of soft drink and I wouldn't give you five cents for the best whiskey alive.

THE COURT: I think you have got good taste. I like good wine, though.

THE WITNESS: All men that associate with me on the ship can prove that I don't smoke or drink and I don't think I'll ever because it don't do me any good.

Q Just to cover one point again. You went to Arkansas shortly before you signed that release, is that right? A Yes, maybe two or three weeks before, maybe longer, but I went I would say about three weeks.

Q It was shortly after Dr. Farr examined you for the first time, wasn't it? A Yes.

Q Now, you had a conversation, as I understand it, not only with the agent from the shipping company but also with the insurance man in regard to settling this case, is that right, sir? A Yes.

(175) Q Now, I'm interested in your state of mind.

MR. HANRAHAN: I object.

THE COURT: Hasn't he already covered that?

MR. GLEASON: I think he has. I think I'm going to sit down and allow my adversary to cross-examine.

CROSS-EXAMINATION BY MR. HANRAHAN:

Q I think you told me once before that you went to sea about forty years since nineteen hundred and something.

A Yes, I have been going to sea for a pretty long time.

Q Always in the steward's department?

A The steward's department.

Q There is one thing I would like to speak to you about: I have heard that one of the complaints you make is that you have to be going somewhere. I think you said yesterday you would be on a ship for two trips and you would have to get off. Is that right?

A Yes.

Q You can't stay on one ship too much?

A Not too long.

Q That is no different then things were before you joined the ship, is it? A No difference--well, I'll tell you something.

Q Let me just try to refresh your recollection.

MR. GLEASON: Let him answer.

(176) THE COURT: He was in the middle of an answer to your question.

A Mr. Hanrahan, can I ask you a few words before I answer your question?

Q Sure thing. A Now this is what I want to ask you: you accuse my attorney and me--

THE COURT: Now, look, Mr. Thompson, please don't

get into personal angles. All I'm interested in are the facts, and the question is, whether before this accident you were changing ships just as after the accident. Now tell us about before the accident. Did you change ships very often then or not?

THE WITNESS: No. The only way I change ship, if you take a trip card like they call a job in LeHavre, or a trip card, and it's about fifteen or sixteen days and when the ship returns to port and the men come back for that job, you got to get off.

THE COURT: Now specifically, before you were on the Rosina Marron, did you change ship every couple of weeks or not?

THE WITNESS: No.

THE COURT: Every couple of trips or not?

THE WITNESS: No.

Q How long would you stay on, six months? (177)

A Some of the trips is three months, some six months and some nine months. I have been on trips nine months and I have been on trips eleven days on tankers, fourteen days, fifteen days.

THE COURT: Did you change every trip no matter how long it was?

THE WITNESS: No, your Honor, not every trip.

Q What I would like to do here is to take a few of the ships you have sailed on since the Rosina Marron so we can get some sort

of an average.

THE COURT: Now let me see, counsel. Do you question the fact that he has changed ships pretty frequently after the accident or do you claim that he has stuck to one ship after the accident?

MR. HANRAHAN: No, since the accident over a period of three years he has been on five, six, seven, eight, nine, ten, eleven ships.

MR. GLEASON: Is that after or before?

THE COURT: After.

MR. HANRAHAN: That is in the three years, four years--in two years before that, before the accident, from 1948, he was on one, two, three, four, five, six, seven, eight, nine, almost the same amount of ships. This is an official Government record and I'll offer it in evidence to indicate that there were some trips before (178) the accident of only two weeks' duration. There are others of two months; another of five months and another of two months.

THE COURT: After all, the criterion is not the length of the trip but the length of service outlasting a trip.

MR. HANRAHAN: Your Honor, I have made a record of every complaint this man makes and I want to systematically break it down.

THE COURT: Correct, I'm interested of course. Ask him about that Government record and see if he doesn't agree

with it.

Q I show you this Coast Guard record, will you examine it? This brings you up to the Virginia in March of '53, and this telegram brings you up to the Moore-McCormack Line boat Uruguay that you just got off. Will you say that is a pretty accurate record of the ships you sailed on? A Well, as I said before, which I told the Judge, some of these trips were fourteen days and if you ship out on a trip card you got to get off when the men come back. Some of these ships stay away for three or four months and if you have been on the ocean sometimes for thirty days sailing, when you get back in port I don't think you want to get back on that ship when you can get a job.

(179) MR. HANRAHAN: I would like to comment from the record. I could ask some questions on that line and still not get it.

MR. GLEASON: I think if counsel will ask for a stipulation that that is a Government record, I have no objection to them but I will say this: that I doubt very much their cogency in the case because a seaman's life is governed more or less by his union. He gets a ticket to go on a ship and then either the ship might be laid up some place or else he has a trip card and his life is not entirely his own, but this gentleman has testified that since his accident he didn't want to stay any place. It's not only on ships that he didn't want to stay, where he is sitting he doesn't want to stay, where he is standing.

That is the gravamen of that.

MR. HANRAHAN: If we're going to try this case and decide it simply on what he says, I might as well quit.

THE COURT: Counsel is willing to stipulate those records in evidence.

THE CLERK: Two separate exhibits marked D-1.

(Marked Exhibit D-1 in evidence.)

MR. HANRAHAN: I will be brief with this bit of evidence. It is just possible we won't sum up and I just want to, for your Honor's sake, point out that this (180) list here, there were ships both before and after the accident on which he sailed three weeks, two months; as a matter of fact, I think with the exception of the Cerro Gordo in 1948, on which he sailed almost four and a half months, the average of the vessels before the accident is from one-half to two months, and similarly after the accident. As a matter of fact, the Torrance Hills is the first vessel on which he sailed after the accident.

MR. GLEASON: Will you give us the date of that?

MR. HANRAHAN: Would you give us the date of that? Torrance Hills is the same as the Wisconsin, the same ship.

THE WITNESS: Yes.

Q You joined July 21, 1950?

MR. GLEASON: That was shortly after the accident.

MR. HANRAHAN: He continued on that ship to January 28, 1951.

THE COURT: I see no use of adverting to shipping after the accident. What you want to show is shipping before the accident.

MR. HANRAHAN: I want to show there is no difference, your Honor. From the question I asked the doctor yesterday, was there anything unusual about a (181) seaman who wanted to keep on the move.

THE COURT: But what happened after the accident is already in the record.

MR. HANRAHAN: No, it is not. There is one question I have here. First, let me just mention the fact that on several of these ships the period after the accident of employment is on the average longer than his performance on ships before the accident. Now there is one other question I want to ask you here.

Q You said that the first time you got these hot flashes was on the Sea Glorius, that you were taken off the Sea Glorius some place. A I was chief cook on that boat.

Q Now, you try to tell us that all you can do is perform the services of a dishwasher.

MR. GLEASON: May we have the date of that Sea Glorius?

Q You said 1952 yesterday, didn't you? A Yes, I was on that ship for only four and a half to five months.

Q After the accident--

MR. GLEASON: When after the accident? When does your record show, counsel?

THE WITNESS: This is in '52, I was on that boat.

MR. HANRAHAN: There is no record of the Sea Glorius at all.

(182) THE WITNESS: When I have my discharge it's got to be after the accident, '52, and the accident was in '50.

Q You say five months? A I didn't say five months, maybe four and a half months.

Q You were on as chief cook? A I was on as chief cook.

Q Which was a higher rating than you had on the Rosina Marron? A Yes.

THE COURT: Did you stay over the stove there?

THE WITNESS: I had to get off the ship.

MR. HANRAHAN: Judge, that was the one he testified he had to get off that at Curacao.

Q Did you go to the marine hospital? A When I got off the ship I went to the doctor in Los Palmas in the Canary Islands and I couldn't work and, as I said yesterday, they made reservations--

Q When you got out of the Canary Islands you came here for treatment. A Not from the Canary Islands, from Curacao I went to the marine hospital.

Q Where? A In Staten Island and I was an outpatient.

Q Do you remember the date? (183) A I can't remember.

Q Did you go for the head or something else?

A For my head, that is why I went.

Q You cannot tell us when? A No.

THE COURT: You have the hospital records there?

MR. HANRAHAN: I have no records of his ever being on the Sea Glorius.

THE COURT: You have his hospital records from Stapleton. Look and see whether they don't show whether he was there in '52 or '53.

Q Following the accident you were first in the marine hospital in February of '51, following your employment on the Torrance Hills. Is that right? A Yes.

Q That is the one where your doctor said the first observation was for psychoneurosis but the final discharge was for duodenal ulcer and chronic urethritis. Is that correct?

A Well, something I'll have to tell you. In marine hospitals you complain about your head, they will send you to one doctor, complain about your stomach, and they will send you to another doctor, complain about your finger, they would send you to another doctor.

Q You got off the ship because your head was bothering (184) you? A On the Virginia.

Q On the Virginia, no first? A I don't know what ship you're talking about. If you tell me right, I'll try to do the

best I can.

Q Following your accident you were in the marine hospital in Stapleton in February of '51 and February of '52. Now, at which time do you claim that you left the Sea Glorius and were treated at the marine hospital, February, '51, or February, '52?

A I was not a patient in the marine hospital when I leave the Sea Glorius. I was just taking outpatient treatment.

Q Where, at Hudson and Jay or at Stapleton?

A I have been to both Hudson and Jay and Stapleton.

Q Does your attorney have any record of that?

A I never tell him anything about that.

Q You didn't tell him anything about that?

A Well, the hospital should prove it.

MR. GLEASON: As far as the attorney having records, we got those records from counsel in this case, we got all the hospital records from counsel as one must do.

THE WITNESS: Can I ask you a question?

MR. GLEASON: Mr. Thompson, don't ask questions, (185) just answer as best you may.

I'm sorry for usurping the Court's functions there.

Q Now, Mr. Thompson, you have had claims against steamship companies before? A Yes, I have.

Q Some of these cases you have settled by yourself.

A They were very small cases.

Q Some of these cases you used attorneys, is that right?

A Never.

Q Do you remember the time you came to my office and I examined you before trial? Do you recall that? A Yes.

Q Do you remember coming to my office and I asked you a lot of questions and you gave me a lot of answers? A I told you I had one attorney, one case with an attorney but it had never come to court. That is what I said. It never was tried.

Q You mean besides this case? A Besides this case, that is the only case that a lawyer ever sued the company and he didn't sue because I told him to sue the company. They came to me when I was sick in the marine hospital in Staten Island and did everything for me to sue the company.

Q You told him to sue the company? A They asked me, they wanted to sue the company, they (186) said it was best for me. I said, "No." Well, I wrote a letter to the company and they didn't come to see me for maybe about a week or ten days and the lawyer came back and said, "They don't care nothing about you, let me sue them."

And I said, "Well, go ahead." And after the lawyer sued the company and I found out, I think it was not doing me any good, I told the company, I said, "I just didn't want to go through the case." And they settled it with me the best they could and settled with the lawyer.

Q Did you pay your lawyer? A I didn't pay the lawyer, the company paid the lawyer.

Q The company paid the lawyer?

THE COURT: What was that all about? How had you been hurt then?

THE WITNESS: Judge, I was chief cook on the David H. Atwater.

THE COURT: I don't want to go into the whole thing but what part of your body was hurt?

THE WITNESS: The part of my body that was hurt was my back.

Q Who was your attorney, by the way?

THE COURT: Does that make any difference?

A I can't recall the man's name.

Q That was the David Atwater? (187) A The David H. Atwater. I never had a trial.

Q How much did you get for that?

THE COURT: Now really, counsel, what has that got to do--

MR. HANRAHAN: This is on relevant matter, this man has had about eight claims.

THE COURT: You tell me why it's relevant to find out how much he got in that case.

MR. HANRAHAN: To show he knows values.

THE COURT: Then we have got to try the amount of his disability in that case, don't we?

Q You had a claim against Gulf Marcaibo, didn't you?

A A claim against Gulf Marcaibo?

Q Gulf Oil Company. A For what?

Q I am mistaken about that. Well, the William A. Green. Did you ever have a claim against that, the Luckenbach Company for a toe injury? A William A. Green?

Q Yes. A Well, that was just a slight thing. I was steward on that boat and a gallon can of peaches fell on my small toe in Panama and broke it at sea. It was broken at sea.

Q Did you settle that case? A The ship arrived in Panama and they took me to the (188) hospital and the hospital doctor he had to break the toe to set it.

Q Did you settle the case? A It wasn't a matter of settlement. When I came back to New York they called me to the office and gave me twenty-five dollars which I wasn't looking for.

Q How about 1946, on the Huberton? A On the Huberton, I didn't have no case against that Huberton, I was sick and went to the hospital.

Q How about the Jarrett Ingersoll? A Jarrett Ingersoll, that's a Lykes Brothers' boat. No, I don't think I have a case against them.

Q Did you have a back injury there? A I had a back injury on that boat. I didn't go to court.

THE COURT: Did they pay you any settlement money?

THE WITNESS: I think they give me $250, your Honor.

THE COURT: Do you remember any claim that you had

for injuries affecting your head?

THE WITNESS: No, your Honor.

Q How about the United Fruit Company in 1939? You had a back injury there, didn't you? A United Fruit--should I tell how it occurred?

(189) Q You signed a release in connection with that?

A Well, I can tell you about that.

THE COURT: We don't want to go into the details.

MR. GLEASON: Just answer counsel's question.

Q You mentioned Lykes Brothers, 1942. You had a back injury, did you? Did you sign a release for that? A United Fruit Company, I have never got any money.

Q Lykes Brothers. A Lykes Brothers is the only one I got some money. I never got any money from United Fruit.

Q I asked you this question in your examination before trial: "You had a back injury with the United Fruit Company in 1939," and your answer on that was, "That was a storm at sea when the ship got hit at sea and knocked the bunk out."

Do you recall that now? A Yes.

Q I said did you get any money? A No.

Q Do you now deny that you said in your examination that you did get money? A From United Fruit? How could I say that when I didn't get no money from them?

Q In 1942, you have already talked about the fact that you had a back injury with the Lykes Brothers and you (190) signed a

release, is that correct?

THE COURT: I think he said that three times now.

MR. HANRAHAN: At this time I would like to offer in evidence the remaining letters. You offered two of them yesterday. These are letters written by Thompson to the company. Yesterday, as Plaintiff's Exhibits A and B, the letters of February 1, and February 9, were put in.

MR. GLEASON: I have no objection to them, your Honor. I wonder if counsel would favor us by reading them?

MR. HANRAHAN: This is the letter from the New Orleans Hospital dated February 12, to Sieling and Jarvis. "Dear Sir, I was just getting in the taxi at the hospital Friday morning about ten o'clock when the nurse came to the door and called me to come back and answer the phone. I did, it was from Collins - Gissel in Corpus Christi. They tell me to come to their office in the Wilson Building. They gave me one hundred dollars for transportation to New York. I already made my reservation on the Missouri Pacific Line to New Orleans. I went to them and asked them to take my ticket back. They refused so I come on to this hospital. My sister and friends met me at the station and take me here. I did not go home, I was feeling sick after the long ride. The doctors here told me I take a hell of a chance riding on a train with a fractured (191) skull. Now I'm back in bed again. But I rather be here with my family than go to Galveston where

they wants to transfer me.

"I want to thank you for making arrangements for me. I will stay here 'til I am well. Near my family will help to ease my mind and help me to get well faster. They can come to see me twice daily three to four--seven to eight. I also can have my radio at my bedside. This much I can say I owed my life to Dr. Perkins, Dr. Russo and the good nurses in the Memorial Hospital.

"I hope to make amends to them some day. Thanks again from William Thompson."

THE COURT: Will you tell me what that has to do with your case?

MR. HANRAHAN: With this case?

THE COURT: With your case, yes.

MR. HANRAHAN: Your Honor, all along this man, as these letters will show, had a complete comprehension of how seriously ill he was. He has talked to doctors, he has had an opportunity--I think you told me in your examination that you had talked to over twenty lawyers and you didn't want them to assist you, is that right?

THE COURT: Counsel, I don't think there is any question but what he realized that he had had a very serious accident. The difficulty that I see and the (192) point that I trust you will meet is his claim that he did not appreciate at the time he signed the settlement paper what the future was going to bring

him, and in that regard he says that this doctor and the agent and the insurance men minimized the future wrongly, not that they did so intending to mislead him; they well may have thought that was the future but, in fact, it wasn't and that is plaintiff's claim, isn't it?

MR. HANRAHAN: But your Honor does recall that Dr. Somberg said the procedure was to also orient the man, and here's another thing I want to point out: that the marine hospital when they discharged him only gave him a month's convalescence and our own doctor recommended three month's convalescence. I'm going to show that that report was brought to his attention.

THE COURT: All right, that's what I'm interested in but please don't put in the record a lot of immaterial matter.

MR. HANRAHAN: I think this is important but I won't read the whole.

"Some wise guys from the hall up in New York told some lawyer of my accident. Two of them was here to see me. They tells me a lot of trash. I listen 'til they are finished. I told them I am a sick man. When I was well I worked for Sieling-Jarvis and up to now they (193) are very nice to me and I'm sure when I get well they will take care of me the best they can. If you two chiselers don't get to hell out of here quick I will call the doctor. Boy you ought to see them scramble out. I laugh at them.

"My head has two compound fractures. I just know I will be up soon. I got my fingers cross. Please keep my job for me. Thank you."

THE COURT: Now, Mr. Reporter, please read to counsel what I just said.

(Reporter does so.)

MR. HANRAHAN: If there is any question on the appeal of this case, this is, to my estimation, one of the strongest bits of evidence.

THE COURT: There was evidence here that would indicate that he was unfortunately given the impression that his recovery had been remarkable and that the future held very small disability.

MR. HANRAHAN: If your Honor prevents me from putting these in evidence now--

THE COURT: I am not preventing you, counsel.

MR. HANRAHAN: I hate to run counter to a judge but I think I have to preserve my record here.

THE COURT: Why, of course.

MR. HANRAHAN: I'll read these very quickly. (194) The next is the New Orleans Marine Hospital, March 16, to Sieling and Jarvis from Thompson.

"I am not too well my head still is doing tricks to me. One minute I'm down sick, my head pain very bad, then I feel a little better 'til the spell come on again.

"The trial came up Monday. I am not well, but I'm taking a chance going to Corpus Christi to be at the trial. I almost die on the way over here. I will try and come to New York after the trial.

"Sir, it may be two or three months before I will be able to go back to work. Please sir, I like my job on the Rosina. Please keep it open that I can go back when I am well.

"I am leaving here Saturday for Corpus. Hoping to be in New York soon. This come with my best respect."

"Corpus Christi, April 5, 1950." To Sieling and Jarvis Corporation.

"The trial is over. I am glad of it. It sure hurt me going from the hospital to Corpus Christi and from Corpus Christi to the hospital. They tried him Monday, he got fifteen months on a mercy plea.

"The doctor tells me to rest here for a few days before traveling again. When I leave here I'm coming to New York Marine Hospital for a week or two."

THE COURT: Medina was lucky as well as Thompson.

(195) MR. HANRAHAN: (Continuing to read.)

"I can only travel one way that is sitting up. I can't lay down or lean back while riding. It hurts my head. I won't be able to work for a while. The doctor says I need lots of rest and quiet if I'm ever to get well. You don't know, sir, but I sure was hurt, triple fracture, I never thought I

would be alive today. I will let you know when I arrive in New York."

I didn't read all that letter because I am trying to save time. This is brief. April 9, Marine Hospital, Staten Island, to Sieling and Jarvis Corporation from Thompson.

"Arrive New York at 6:35 a.m. this morning. The long ride made me sick, I come to the hospital at 9 a.m. They put me to bed my head is cutting up, I come here from Corpus Christi after the trial. I'm in Ward Number 473 fourth floor."

The Marine Hospital, Stapleton, New York, April 13, 1950, to Sieling and Jarvis.

"Please send someone from the office to see me so many came to see me. I told them I am still sick and don't want to talk to any lawyer. It is three months now since I got hurt. So many different ones come to try and get me to talk to them I won't talk to or see anyone until I have seen someone from Sieling and Jarvis. I got (196) here Sunday from Corpus Christi. Please let me hear from you soon so I can know what to do. Lots of guys telling me different tales. I don't listen to them."

That is all, thank you, your Honor.

THE CLERK: Marked as one exhibit, D-2.

(Marked D-2 in evidence.)

MR. HANRAHAN: D-2.

THE COURT: Mr. Hanrahan, let me be quite clear with

you. From your standpoint there is no question he had a serious trauma, he knew he had a serious trauma. The point that I would like to hear what you have to offer in evidence on is whether or not he was not perchance unwittingly misled at the time he signed the release by you people into believing that his sequelæ were minimum.

Q The first fellow you dealt with in Sieling and Jarvis was Mahoney, is that right, you used to write to him from the south? A Yes.

Q He never came to you in the Marine Hospital in Stapleton? A Yes, he sent men to see me in Galveston Hospital.

Q That was the agent, Collins-Gissel, is that right? A I don't know, he claim he was from Sieling and Jarvis.

Q That was to give you a hundred bucks to get to New Orleans, was it? (197) A No, this was while I was sick in Galveston Hospital before I go to the trial in Corpus Christi.

Q He came in to see if you wanted anything? A Yes, Sieling and Jarvis sent him to see me, if I wanted some money. I didn't need anything then.

Q He didn't talk to you about settling the case then? A No, he didn't mention anything about the case.

Q When you got to New York you asked Mahoney for money and he sent somebody over with how much? A Fifty dollars.

Q When you got out of the hospital I think you told us you went to the Seamen's Institute to live, at 25 Church Street.

A Yes.

Q Did Mahoney contact you or did you go to the office? A No, he didn't contact me, I went to the office, it is just a few blocks.

Q You went to Mr. Mahoney's office and he--what did he say to you and what did you say to him? Do you recall--is that when you wanted to go to Hot Springs? A You want to know what I said to him and what he said to me?

Q Yes. A Well, he asked me if I am well and I tell him no, I don't think I am quite well because I still had pains in (198) my head but I would like to get some money to go down to Arkansas some place in the country, maybe for two or three weeks and I might be better when I came back.

Q Did you tell him how much money you needed and did he give it to you? A He asked me how much I needed and I said three hundred dollars about, and he gave it to me.

Q When you came to Mr. Mahoney did you have a discharge certificate from the marine hospital? A From the marine hospital, sure, I got to have one to leave there, you know that.

Q You gave him that? A I don't know whether I gave it to him or I kept it but I know I showed it to him.

Q That is the one that told you you had to lay off for a month before going back to work, is that right? A Yes.

Q Does that discharge certificate mention that you had a fractured skull? A I don't understand these medical records

and I never questioned the doctors.

Q Did that slip say that according to the marine hospital you would be fit for duty about a month from the time you got out? A That's what the hospital said.

Q The hospital said you would be able to go back to (199) work in a month? A The doctor said he was giving me a month, he said he was giving me a month's rest before I go back to work. That is why I take advantage to go to Arkansas because I think like the doctor said--

Q What was the name of that doctor? A I don't know the doctors. Their name is on my discharge if you look that up.

THE COURT: This is the doctor in the hospital?

THE WITNESS: In the marine hospital.

Q He told you to take a month off but you can go back to work. A Yes, and I take advantage of it and I figure I'll go back to Arkansas which I know.

Q This was the regular marine hospital that told you that? A In Staten Island, so I got the money from Mr. Mahoney and I went down to Arkansas. I think I stayed there about three weeks and I felt from here down (indicating) I was all right but I still had pain where the cut was, and when I came back he asked me, "How are you, Thompson?"

And I said, "Well, I feel all right outside of my head." I said, "I can do anything and everything but my head still hurts."

(200) Q This was when you were talking to Mahoney?

A I talked to Mahoney.

Q This is before you were examined by Dr. Farr?

A No, I was examined by Dr. Farr before I went to Arkansas.

Q Before you went to Arkansas? A I think so, I'm not sure. It could be--that is before I went to Arkansas.

Q You got out of the marine hospital on April 20, 1951--1950, I'm sorry, April 28, 1950. Do you remember that April 28, 1950? You were examined by Dr. Farr on May 20, almost a month later and you signed this release on June 2. Now, is that--

THE COURT: Of what, 1950?

MR. HANRAHAN: All of 1950.

Q So with those dates in mind, would you say that you went to Hot Springs before you were examined by Dr. Farr?

A Read that again, I don't want to get mixed up.

Q April 28 you got out of the hospital. May 20 you were examined by Farr. June 2 you signed a release--let's put it this way: how many days did you live at the Seamen's Institute before going to Hot Springs? A I can't remember but I was there for quite a while.

Q You were in Hot Springs three weeks, you said.

A I just can't remember how long but I would say maybe (201) two or three weeks.

Q Wouldn't this be right--

THE COURT: I just wonder, counsel, if it wouldn't be a good idea to take the morning recess. We have had no recess

and I just wondered if human minds are not a little tired.

- NOON RECESS -

- AFTERNOON SESSION -

W I L L I A M T H O M P S O N , resumed the stand.

THE COURT: Counsel, I'm assuming that this is going on after tomorrow and if that is the case, and you gentlemen could tonight after court complete those findings of fact and conclusions of law and bring them in tomorrow--

MR. HANRAHAN: I ran some off last night that should be here this afternoon.

MR. GLEASON: I have some but I don't think they are as complete as they might be.

THE COURT: Complete them over the night and bring them in tomorrow.

MR. GLEASON: There is just one addition I want to make to the findings of fact and conclusions of law and that is in regard to the release. I think it should be more explicit.

THE COURT: As I say, don't give them to me now, revise them tonight and give them to me tomorrow.

From the dates he gave you would you say it (202) was before you were examined by Dr. Farr that you went to Hot Springs? If you don't know, say so.

THE WITNESS: There were so many things happened and before I said something wrong I just can't remember.

THE COURT: All right, if you don't know, say you don't

know. Could you tell me how many times you saw Mahoney?

THE WITNESS: I am pretty sure I saw him three times. It could be four but I remember three times.

CROSS-EXAMINATION (continued) BY MR. HANRAHAN:

Q Well, the first time you went to get money for Hot Springs, is that right? A I saw him, I saw him then when he sent me to the doctor and another time I saw him the day the case was settled. I think three times I saw him.

Q You didn't really settle the case with him, you settled the case with the shipowners, isn't that right? A Well, between the both of them he was the first one that talked to me about the case and told me what I could get and what they would give me.

THE COURT: The last one was Barron?

THE WITNESS: Yes.

Q When you signed that release you knew what you were doing, didn't you? A To a certain extent.

(203) THE COURT: I don't suppose there is any question but what the man knew he was signing a release and not a promissory note.

MR. GLEASON: I object to the question.

THE COURT: I'm going to assume, in the absence of further proof, that the man knew he was signing a release when he signed that paper.

MR. HANRAHAN: I have no further question on that, then. There are just two questions about entering into the

release.

Q When you decided to accept four thousand dollars, did you consider how long you would have to wait before you tried the case if you didn't accept the four thousand dollars? You were familiar with that, that it takes a little while to have your trial come up in court? A There wasn't any court or any trial.

Q You knew you had a right to sue if you didn't take the four thousand, didn't you? A I'm sorry I didn't keep the letters that Mr. Mahoney written to me. I couldn't keep them because they stole so many different things from me.

Q Who stole? A Shipmates.

THE COURT: I'm going to assume that he knew he could sue.

(204) Q I would like to get up to things that led up to the accident on the ship. You said yesterday that even before you went into that forecastle on January 12, the day before the assault, you had spoken with the steward and said it would be a good idea to get Medina off the ship; "He is more like a woman than a man." Is that right? A The morning, the day before the accident.

Q Some time before the accident, you said. A If you remember carefully what I told you, I told you I had spoken to the steward before the accident about Medina's actions on the ship and then the morning after the incident what I saw, I told him what I seen.

Q Let's go over it again. As I recall, at 6:30 or so you saw this, what you claim was taking place and you reported to Caplis

that evening right after and the next morning you reported to Schiffer that you had found what you called a homosexual act going on. Didn't you say yesterday that you had talked to the steward about Medina's behavior even before you say you claim you saw him with Pittaway? A That is what I tried to tell you about. I told the steward what I seen before and I told Caplis the same thing.

THE COURT: You don't understand his question. I'll say this, I remember his talking with the chief cook (205) or steward, I don't know which, about the effeminate character of Medina.

Q Before the night of the 12th.

THE COURT: Before the night of the incident. Whether at that time he said he ought to go off the ship, I am not so sure.

Q Let's put it that way: do you remember the night of the 12th, that is when you claim you found him in the forecastle? Had you ever spoken to the steward or anybody else prior to that time about it being a good idea to get Medina off the ship? A I told the steward before--you keep asking me this--I told you what I told the steward when I found out what Medina was doing, going around kissing these guys and different things. I told the steward a man like Medina is not fitting to be waiting on the crew.

THE COURT: Not fitting to what?

THE WITNESS: To be--not fitting to be in the crew, to be on the shipboard, to be a member of the crew.

Q Can you give us a rough guess about how long that was before--put it this way--you got on the ship in October--

THE COURT: Is the steward a petty officer like the purser?

MR. HANRAHAN: He is the head of the steward's department.

(206) MR. GLEASON: The chief steward is one of the officers of the vessel and he is accountable only to the captain.

MR. HANRAHAN: There are three departments, the engineer, the deck and the steward department. The purser of a ship is sort of in a fourth category. He is the clerk of the ship.

THE COURT: Let's forget the purser, he is like the chief engineer.

MR. GLEASON: There is some dispute whether he is a commissioned officer. He comes in the same union as the unlicensed personnel whereas officers have their own union.

THE COURT: He is the superior of the cook or second cook and the second cook, therefore, should report to the steward any complaint within the steward's department.

MR. HANRAHAN: Right.

THE COURT: Query whether notice to the steward is, therefore, not notice to the master.

MR. GLEASON: Of course it is, your Honor, for this reason, your Honor, and I think this is very important: there

are three persons on the boat who are accountable only to the captain; one is the chief mate, one is the chief steward and one is the chief engineer. Now the purser, as my friend has stated, has a rather ambiguous (207) position between everybody.

MR. HANRAHAN: I will admit he made a report to the steward.

MR. GLEASON: That, we contend, is notice to the ship.

MR. HANRAHAN: Of what?

MR. GLEASON: Of whatever it was.

THE COURT: Of the unfitness of Medina, that's exactly what he said.

Q When did you first report, shortly after you joined the ship? A I can't recall. I reported that some time before then.

Q You told us yesterday as soon as you got on the ship the chief cook said to you, "He is a she." A That is right.

Q In other words, everybody on the ship knew that Medina was effeminate. A Yes.

Q In spite of that , was he a good messman? Did he do his job good? A You are asking me something I can't answer.

Q You don't know? A I work in the galley and Medina worked in the mess room. I have nothing to do with his work.

(208) Q Up until you asked that union meeting to get him off the ship, had you heard anyone say that he ought to be taken off the ship? A There was lots of comment going on around about what happened

among the crew and the crew and officers.

Q What happened when? A What happened that night.

Q After you made the report of what you saw? A Yes.

Q But you are the only one that saw that of the forty men on the ship. You're the only one that saw it. A No, no.

Q Who else saw it?

MR. GLEASON: I think that calls for a conclusion.

Q Who else saw it? A Them that was in the room besides me.

Q Three men that were in the room and you? A And Medina was four.

Q I'll get to that later. You resented this effeminateness of Medina very much, didn't you? A Not of Medina but of any person, any man doing what Medina would do, going around like Medina was.

Q In other words, you are a pretty masculine fellow, yourself, and anything effeminate upon the part of another man is very obnoxious to you. (209) A Yes, I don't like it.

Q Well, now, I don't like getting into the actual description of this but I think it's necessary. How many men were in the room when you opened that door? A There was four men in that room.

Q You are positive of that? A I am positive of

that.

Q You have so testified at all occasions before, is that correct? A I think I have.

Q Now, you recognized two of the three men in the act, is that right? A Yes.

Q Pittaway was one, Medina was another, and you don't know who the other was. A I don't know his name but he was the other young fellow, not the old man.

Q Were these men dressed? A No, they wasn't; they had on the usual, just the top shirt.

Q Were they undressed? A They were undressed then, they didn't have no pants on.

Q You said one man had his penis in Medina's mouth. Is that right? A No, no. Medina had his mouth--

(210) Q In someone else's penis? A Yes.

Q Whose, Pittaway's? A No, the other fellow.

Q What was Pittaway doing? A Pittaway had his penis in Medina's rectum.

Q Now, when you reported this incident to Caplis, did you make such a vivid description? A I don't know how I made it but I told him just what I saw.

Q And when you told the steward you told the same thing? A I told the steward the same thing I told Caplis.

Q Did you leave the room immediately after discovering these men and go to Caplis? A Right then I came up on deck.

THE COURT: After you came up on deck who did you see?

THE WITNESS: I seen Caplis.

THE COURT: Right away?

THE WITNESS: Yes.

Q I want you to look at this statement that is in your handwriting. A That is my handwriting? I didn't write that like it is there.

Q It is stipulated that that is your signature?

(211) A That is my signature, yes.

Q In other words, after the assault took place there was an investigation by the Coast Guard and the purser, is that right? A I don't know, I wasn't on the ship. They took me off the minute the ship arrived at the dock.

Q Where did you sign the statement? A I don't know where I signed it but I know that is my name. I don't know whether I signed it on ship before I get off or at the hospital because the Coast Guard was at the hospital when they was on the ship and I was too sick to know.

Q Did you say in this statement, "On Thursday night, January 12, I went down to the forecastle. The door was closed. I didn't knock. I pushed it the door wide open and saw the crew messman on top of Pittaway in Pittaway's bed. They were surprised when I came in. The messman jumped off the bed and Pittaway came out next holding his testicles in both hands and said the messboy hurt

him. He told him, the messboy, not to do it but what he meant I don't know. Both men were dressed." A No, I never mentioned anything about both men were dressed. I mentioned three men. Whoever typed it--

Q There were four men in the room?

A There were four in the room.

(212) Q You are positive? A I never change my statement on no one. I know what I said and what I seen and that is what I said. Whoever typed that letter--

Q Do you know that an official Coast Guard investigation was conducted after this assault? A I don't know what happened while I was in the hospital.

Q Do you know that the official Coast Guard report says that you erroneously sized the situation up as sexual perversion? The official finding of facts said that, "Thompson erroneously sized up the situation implying sex perversion."

MR. GLEASON: I object to this. I can't see how your Honor can gain anything from that whether it's an official Government document. We don't know that, we have no proof of what the Coast Guard or who the Coast Guard heard or saw or anything in regard to this and the findings are not your Honor's findings.

THE COURT: That is perfectly true but there is a statute we have to deal with.

MR. HANRAHAN: Official Government records like

clinical abstracts and reports.

MR. GLEASON: I can't see their competence. I can't see their value. It's just we are not--we have not had the advantage of hearing what went on at the (213) Coast Guard hearing. We have not the advantage of knowing who testified.

MR. HANRAHAN: It shows right here what the witnesses were that were interviewed.

THE WITNESS: But one thing you leave out. I explained to the Judge and the captain and the Coast Guard--when they said something to me on the ship, when I caught these three men in--when we have the meeting in the room Young and the two other men said to me, "Well, you see you might be right but you won't get no one here of this crew to side in with you because three parts of them was with Medina and to save themselves, because two of the men are in trouble with the Coast Guard, they don't want to get in any more trouble." And they told me I was alone and I wouldn't have a ground to stand on because they would not witness for me.

Q Did you bring charges at that meeting against the white men, too? A Well, three men that were in there.

Q Three? Caplis is going to testify you brought charges against one man, Medina. A It doesn't make any difference who Caplis said, I said what I see.

Q You are quite sure there were three men--

MR. HANRAHAN: I want to put this in evidence.

(214) MR. GLEASON: I object to it, your Honor.

THE COURT: The statute is involved, counsel. If you can show me how under the statute it doesn't go in, well and good.

MR. GLEASON: I don't think the statute is as all embracing as that, your Honor, that a Coast Guard finding on a collateral matter has any bearing whatsoever--

THE COURT: There is a very recent decision, counsel, by the Third Circuit, which takes up all these preceding decisions somewhat at variance with each other and lays down a general rule which I would not attempt to repeat without looking at the decision. I would suggest you check at my chambers for the name of that decision and then, in the light of that decision, you may renew your objection and I will rule on it finally at that time.

MR. GLEASON: Yes, sir, I will do that.

THE COURT: Let's mark it in evidence subject to being stricken.

THE CLERK: D-3.

(Marked D-3 in evidence.)

THE COURT: I shall not read them unless and until plaintiff fails to object.

Q You remember you testified in the trial of Medina down in the United States District Court for the Southern District of Texas?

(215) A Yes, I testified.

Q You are still positive there were four men in that room and there were three men engaged in this unnatural act?

A I am sure of that.

Q Let me read to you from this record of testimony at Medina's trial and ask you if you were asked this question and if you didn't give the following answer:

"Q. Right. Now, William, will you state what happened the day prior to the day on which the occurrence here happened, that is, what happened on the 12th of January, 1950, relative to you and the defendant Mario Medina? When did you see him and did you--

"A. Well, at sea every afternoon after supper I used to go down to the eight to twelve forecastle and call a couple of boys for rummy game and this forecastle was on the boat and most every evening the door was open halfway a crack and I just walked in and Medina would be always sitting on--I can't recall his name--on Pittaway's bed, on the side of the bed."

And the Court said, "Now, whose bed?"

"A. Pittaway's, he would always be sitting on the side of the bed and playing with the boy and then sometimes he sat on a chair with his hands playing with him but nothing else happened. On this afternoon, on Thursday, January 12, I went down as usual and the door (216) was closed. I didn't knock on the door, I break the door open and Medina and Pittaway was in bed and Medina jumped up. He was scared and Pittaway

got off him and said, 'Oh, Lord, Medina done hurt me. I told him not to play with me like this.' And the other boy was sitting on the other bed and he said, 'I am glad you came to break this dirty thing up.' Well, that's all I can say what happened in the room. I went upstairs, I told the chief cook."

That is your testimony at the trial of Medina.

A I testified some of that, now I want you to listen good. I think there was a half a dozen women at that trial and I couldn't have spoken those words before them.

Q You only said there were two men in bed. A I am not sure I said two. I am sure there was three men involved and one man was on the bed and that is the man that spoken to me.

MR. HANRAHAN: By the way, I want to offer his statement in evidence. He admits signing it.

MR. GLEASON: May I see it?

THE COURT: Show it to counsel.

MR. HANRAHAN: You have seen it, I sent you every statement we had. Stein came over to the office and I handed it to him personally.

MR. GLEASON: I am independent counsel, I was (217) brought into this case very lately.

MR. AXTELL: I think the difficulty is that he sent us a typewritten copy and it had typewritten signatures. I personally called Mr. Hanrahan and asked him about that and he started to get the file to find out and he said, "Yes, I think I should have

sent you a photoprint of the written signature and we promise to do it." But as far as I know, it has not arrived. That was only last Friday. We don't charge any intentional neglect, of course, but we did not see it until now.

MR. GLEASON: May I ask a few questions about this statement, your Honor? It's the usual thing before accepting a statement in evidence to ask how it was taken. That's all I want to do.

MR. HANRAHAN: He admits it was his signature and I think that's all we need, that's all you need or--

MR. GLEASON: May I question on that?

THE COURT: Yes.

VOIR DIRE BY MR. GLEASON:

Q This is dated January 14, I think, January 14, 1950. Where were you on January 14, 1950? That was the day after this meat cleaver came down on your head, wasn't it? A Yes, that was on Saturday. I was in the hospital, the ship's hospital at sea.

(218) Q How did you feel then? A I was quite sick.

Q Were you able to talk very much? A I could talk but not much.

Q Were you able to think very straight? A No, my head pained me so much.

Q When you signed this did you sit up of your own accord or did they help you up? A When I signed that--was that

taken on the ship?

MR. AXTELL: He has not stated that he signed that.

MR. GLEASON: I am sorry, your Honor, but I have to conduct this examination myself.

Q On January 14, 1950, again I ask you, on January 14, 1950, you were in bed in the ship's hospital, is that right?

A Yes.

Q And you were in pain? A I was.

Q And you were ill? A I was.

Q Is that right, sir? A Yes.

Q And somebody came in to take a statement from you, did they? A I don't know who that was or who came in, I can't recall.

(219) Q Was it the purser? A The purser was always in the room.

Q Now, did he ask you some questions about it?

A I can't recall the questions he asked me. He might have asked me some questions.

Q Is that your signature at the bottom of this?

A I know my signature. This is my name "William Thompson" but I don't know of anybody reading these to me.

Q I am going to ask you that, Mr. Thompson. Did anybody read anything to you before you signed this? A No.

Q Did you read it to yourself? A I couldn't read because my head was covered up and I was in pain.

MR. HANRAHAN: I object to this, your Honor. That is his signature. I think it goes to the weight.

THE COURT: Admit the statement.

(Marked D-4 in evidence.)

THE COURT: Now, counsel, in this matter of the Coast Guard report, the case that I have reference to is Gordon against Robinson which may be out in the Advance Sheets.

MR. HANRAHAN: Gordon?

THE COURT: Gordon versus Robinson, Third Circuit, an opinion filed January 13, last. I have the slip of the (220) opinion.

MR. GLEASON: May we have that?

THE COURT: I don't want to let you take it away.

MR. GLEASON: All we want to do is read it right here.

THE COURT: I think it shows several statutes are involved.

MR. GLEASON: May we read it here, your Honor?

(Court hands paper to Mr. Gleason.)

MR. GLEASON: Thank you very much.

CROSS-EXAMINATION (Resumed) BY MR. HANRAHAN:

Q You said yesterday you were removed from the ship on a stretcher, is that right, over the side? A Yes.

Q Isn't it a fact you walked off the ship? A No, they hoisted me up, they hoisted me from the ship, they took me out and put me in some kind of a basket and hoisted me over the ship

and put me in an ambulance to the hospital.

Q You were able to get out of bed to go to the bathroom? A The bathroom was right next door, which I go to the bathroom very seldom. They had something in the room for me to urinate in. The bathroom was in the same hospital.

(221) Q How about meals? Did you get your meals in bed? A Everything in bed which they didn't let me out. I didn't eat much, soft drinks, sodas, and stuff like that.

Q You claim after you spotted this act you went up to Caplis, is that right, and reported to him? Is that correct? A Yes.

Q If I was to tell you that Pittaway gave a statement to the Coast Guard in which he says you and he and Medina left that room right after you came in and went up and started to play cards, would you say that is a true statement or a false statement? A I say that is a false statement.

THE COURT: You say then you did not go upstairs and play cards?

THE WITNESS: I played cards later but that was after I reported.

Q Was Pittaway playing? A I don't remember whether Pittaway was playing.

Q You can't tell us whether Pittaway and Medina were in that game? A I can't remember.

Q But you used to play with both those men quite a bit? A We played all the time on the ship.

Q You used to have arguments with Medina because he (222) spoke in Spanish in those games? A Not all the time. Medina always started the argument when I beat him out of a good pot.

Q You would also have arguments with respect to his use of Spanish at meal times? A Yes, that is best I could do.

Q Was it every day? A No, not every day.

Q Did that get violent, those arguments? A No, they didn't get violent because at times I said to him, "You speak good English, why don't you do it all the time?"

Q Didn't you have unusual resentment of Medina because he was effeminate and because he was one of the few colored men on the boat? Isn't that so? A Now wait, let me tell you something: I guess if you was a man and know him involved in those kind of things, you would resent anybody involved.

Q Isn't it a fact that at the union meeting you only brought charges against the colored man, Medina? A Medina was the man but there were two other men involved and both men were in the room and both men decided they would go off the ship and Medina was the one that decided that he would not get off.

Q Do you know that Schopf and Pittaway stayed on that (223) ship four months after this thing took place? A I don't know what happened, I was in the hospital.

Q Did you and Medina have an argument at that card game following this incident in the forecastle January 12?

A On that night? I can't remember that.

Q If I were to tell you that Mr. Pittaway in this report to the Coast Guard said, "Late that night, about 4:00 a.m., January 13, the second cook got mad at the crew messman over the way he was playing cards. The second cook," meaning you, "said to Medina, 'I'm going to teach you how to play cards. Come out on deck and I'll whip your black ass. I'll find a way to get your ass out of this ship.'" A I never spoke like that to neither Medina or Pittaway.

Q I am saying if you knew that such a statement was made, in your opinion, was it true or false? A That is false.

MR. GLEASON: I object to this method of cross-examination, your Honor, as being improper.

THE COURT: Now, counsel, we're not dealing with a jury.

MR. GLEASON: I realize that.

THE COURT: I'm not going to pay the slightest attention to what is in the question as being evidence of the fact.

MR. GLEASON: Yes.

(224) MR. HANRAHAN: Though there is no jury here I would like your Honor to recall that two men--I wanted an adjournment and consented to go into a nonjury trial without a jury to enable these men to get this case over with. I can take the stand--

THE COURT: The proposition as to hearing the case non-jury came from you.

MR. HANRAHAN: As an alternative to an adjournment.

THE COURT: Which I had not granted.

MR. HANRAHAN: I offer the release in evidence.

Q Your salary was $248.49 a month? A I was second cook, I just can't recall the wages.

Q Well, I have a report of personal injuries. Would that be about right? A Two forty-eight something, that could be about right for second cook.

THE COURT: You have testified here, have you not, that as a result of this accident you have never been able to sail as high as second cook again? Is that right? That you have to take the job of dishwasher?

MR. HANRAHAN: No, he didn't say that.

THE WITNESS: No, I didn't.

THE COURT: I definitely recall his saying that (225) he sailed as cook but he found he had to leave the stove.

Q Did you sail as cook before you had to give up sailing as cook? A I was chief cook on--I started out as messman, that was on the Torrance Hills, that was the first job I had after the accident.

Q What was your next job? A My next job, I think, was a messman and then as galleyman.

Q The next job on the Christianbergh?

A That was second cook, I think.

Q That was a year after the accident?

A Yes, I think that was second cook.

Q And you were on the Fort Mims, is that right?
A As second cook.
Q You were on that ship until January, '52. How about the Santa Ines? A I didn't stay there long, I think I was on that boat maybe twelve or fourteen days.
Q How about Santa Catalina? A Santa Catalina, I was utility man on that ship.
MR. GLEASON: For the benefit of the Judge, who must decide this case, you ought to give dates. When you say, "How about the Catalina," will you give dates?
Q August, 1952, to September, '52, what were you, utility (226) man? A Utility man.
Q How about the Virginia, December to March?
A On the Virginia I was galley man, almost the same thing like utility man.
Q What were the dates of that? A December, '52, to March, '53.
Q The Friborg Trader, I don't have the dates of that; it was about April of last year, right? A Yes. That's utility man again.
Q The Argentina, that is a large passenger ship?
A Yes. I was dishwasher on that.
Q What are the dates of that?
MR. GLEASON: September to October, '53.
A No, not on the Uruguay, January 7 to February 15, on the

Uruguay.

MR. GLEASON: What year?

THE WITNESS: This year.

THE COURT: I can't help noticing that associate counsel are interested in that opinion. I don't recall whether that opinion alludes not only to the Business Records in Evidence Act but also to the separate statute which governs the introduction of official as distinguished from business records. It is with official records that I take it we are concerned here on the Coast Guard report, I think.

(227) MR. HANRAHAN: I think that is all.

MR. GLEASON: I wish to have that Coast Guard report.

MR. HANRAHAN: His release is in evidence.

THE CLERK: No, you didn't bring it up. Thompson's statement is D-4. That has been marked. This release will be D-5.

(Marked D-5 in evidence.)

THE COURT: I would like to see that Thompson statement.

REDIRECT EXAMINATION BY MR. GLEASON:

Q Mr. Thompson, the date of this Coast Guard report is January 27, 1950. Now, can you remember answering any questions that the Coast Guard put to you, that any officer of the Coast Guard put to you? A January 27, 1950?

Q That was--I will tell you exactly how long after the

accident that was.

THE COURT: Two weeks.

Q Two weeks after the accident the report came down. Now, can you remember any Coast Guard officer asking you anything?

A I can remember one thing about the Coast Guard officer. He came to the hospital.

Q What hospital? (228) A The Memorial Hospital in Corpus Christi while I was sick and he said a few words to me and that was all. I never signed any paper for him or spoken to him because I was sick.

Q Did you tell him anything about this incident?

A No, because he never questioned me about that but the night of the arrival of the ship the Coast Guard said something to me but it was very brief.

Q Who said--when you say the Coast Guard said, tell us who was it, an officer of the Coast Guard? A A Coast Guard officer.

Q Where did he say something to you?

A In the hospital.

Q The Corpus Christi hospital? A No, the ship's hospital before they removed me.

Q How long was he with you in the ship's hospital?

A I would say maybe two or three minutes.

Q How long was he with you in the Corpus Christi Memorial Hospital? A Maybe about five minutes. He just came and

said something to me and that was all.

THE COURT: It's perfectly obvious anyway.

THE WITNESS: Well, all right.

MR. GLEASON: I wish to call your Honor's attention to the fact that this investigation was not an (229) investigation into the culpability of anybody, it was a routine investigation into the injury to Mr. Thompson, and, your Honor, at this time I again object to this on that ground, that this is not pointed toward the fact of whether or not--this investigation was not pointed toward the fact of whether or not Medina was culpable, that is, was guilty of sex perversion or an act of sex perversion. It was merely a routine investigation into an injury, this injury to William Thompson, and at this time, your Honor, I would again call your attention--or I will call your attention in regard to the value of such a finding, that the Coast Guard investigations into injuries do not involve the taking the witness'--the witness' taking the oath or anything like that, they are merely investigatory; in other words, they ask maybe three or four witnesses what they know and upon that they make such a finding as this. It has nothing to do with this--this has nothing to do with Medina's characteristics or lack of characteristics.

THE COURT: Now, in the first place I think you will both agree there the Coast Guard report is not binding on this Court as to the finding of the Coast Guard. It constitutes

evidence prima facie. Now, there is the interesting point of law to which you gentlemen allude. I don't recall exactly the ruling in this Gordon Case but I (230) have an impression that the general principle is this: that when a certain administrative authority is authorized to make a certain investigation and the report thereon, their report is evidential on that subject matter but only on that subject matter. So, if this report were only made and only authorized on the question of the cleaver it would not have evidential effect perchance on the homosexual act. Now, I don't know, that just occurs to me.

MR. GLEASON: Well, sir, I'll read you the subject of the investigation as incorporated in this report.

"SUB", which is the Army and the Navy and the Coast Guard way of putting the thing, "William Thompson, 116599, crew member Rosina Marron, injury of 13 January 1950, at sea", and that is all. There is no mention of any investigation into the culpability of one Medina or one Pittaway or one Schopf.

THE COURT: I don't agree with you there, I think it may raise a question as to the culpability for the injury but the question of culpability for the injury does not necessarily contain within its scope the homosexual act of some third party preceding the attack with the cleaver.

MR. GLEASON: That is what I mean.

MR. HANRAHAN: The investigation was conducted to determine the culpability of Medina.

THE COURT: And, in fact, he was tried.

(231) MR. HANRAHAN: And his license revoked.

THE COURT: The investigation, however--

MR. HANRAHAN: They found out certain things that affected this man's credibility.

THE COURT: Counsel, please, we were talking about the investigation of Medina.

MR. HANRAHAN: Yes.

THE COURT: I take it that that resulted in a trial and it resulted in a trial not for indecent exposure or whatever you would call it but a trial for an atrocious assault and battery.

MR. GLEASON: That is right; as a matter of fact, it was attempted murder, I think, the charge.

THE COURT: All right, attempted murder. Was there any other investigation of Medina?

MR. HANRAHAN: I guess the F.B.I. conducted one.

THE COURT: Was there any other investigation as to his homosexual acts?

MR. HANRAHAN: No, that is the big thing in this whole case. I think when all this evidence is in, the only thing, the only evidence of homosexuality, not effeminateness, homosexuality, is this man's story. The report, such as the Coast Guard reports, the other statements we have here, contradict this man all the way through, like having reported specific acts to Caplis--no specific act being (232) reported. He claims he

reported all three men to the union meeting. Caplis, his own steward's delegate, says no, this was only for one man. I believe Schiffer will so testify, too, and in the light of everything, the depositions of the man who was in the room--

THE COURT: Do you have Medina and Pittaway as witnesses?

MR. HANRAHAN: No. I have Schopf, the other man in the room.

THE COURT: He's going to appear?

MR. HANRAHAN: I have got his testimony. This is a most unusual case, Judge.

THE COURT: All right, let's proceed to try it.

MR. GLEASON: There is one thing I would do while it is in our thoughts to bring to your attention: counsel, here, naively, I think, seeks to draw a very black line of separation between the characteristics of Medina and the homosexual act itself. I, at this time, your Honor, I would like to state my view on that and very briefly, that there is very little dividing line. In other words, if we have, for instance, a person who is a nymphomaniac and we find that only one person has seen that person in illicit intercourse--

THE COURT: It's perfectly simple. If Medina had the characteristics testified to before that homosexual (233) incident occurred, there is no question but what he would accept any opportunity offered to gratify his innate personality.

MR. HANRAHAN: I except to that statement.

MR. GLEASON: I think that expresses it very well, your Honor.

Now, just a couple of questions to Mr. Thompson.

BY MR. GLEASON:

Q Mr. Thompson, I want to refer just once more to your trip to Arkansas. As I take it, Mr. Thompson, at the time that you went to Arkansas you had no idea that your injuries were of a sort that would last throughout your life. Is that right? A I didn't have no idea that I was that bad.

Q When you came back from Arkansas, did you fell better than when you went down there? A When I came back I felt a whole lot better, all over, but just this little knickknack up here but I didn't pay no attention to that because I didn't know in the future what the outcome of that would be.

Q You had been to Dr. Farr, hadn't you--

THE COURT: Do you have other medical testimony?

MR. GLEASON: No.

THE COURT: Now you see, gentlemen, this being without a jury I'm being a little freer.

(234) MR. HANRAHAN: I want to say this--

MR. GLEASON: I have in that line--

MR. HANRAHAN: --and on this question of homosexuality--

THE COURT: I'm not talking about that.

MR. HANRAHAN: You see, I differ very much from the statement you just made that if these tendencies existed and the rest your Honor stated--

THE COURT: There is no question, he would avail himself of the opportunity to satisfy himself in an abnormal way.

MR. HANRAHAN: I don't think that is true.

THE COURT: In the absence of testimony to the contrary, my mind is clear.

MR. GLEASON: Apropos of further medical testimony we just got today something which has a rather serious aspect. I would like your Honor to read it.

THE COURT: Now what are you talking about, Thompson's injuries?

MR. GLEASON: Yes, apropos of Thompson's injuries, they are new hospital records.

THE COURT: Show them to counsel.

MR. GLEASON: There are also, your Honor, x-rays from the hospital which I think your Honor, himself, should look at through the shadow box because I think they will

(235) serve to enlighten us on many of the aspects.

MR. HANRAHAN: I don't see how anybody can understand x-rays.

MR. GLEASON: There is evidently, from this hospital record, there is evidently an involvement.

MR. HANRAHAN: I have no objection to that. I would

like your Honor to read it very thoroughly. I think it's favorable to our defense.

THE COURT: Now, counsel, please, referring to the line you were pursuing, my question is whether that particular angle requires any further elucidation because, as I see it, the evidence now is that this man saw Dr. Farr at about that time. Dr. Farr told him just what he told us here, namely that Thompson in some three months could go back to work.

MR. HANRAHAN: He didn't tell him anything, remember that.

THE COURT: Thompson told him something to that effect.

THE WITNESS: No, Dr. Farr never spoken to me about my treatment or examination. That's what I said to the Court, Dr. Farr never spoken to me. All he did was send me back to the agent.

MR. HANRAHAN: He never told you you were well or anything else?

(236) THE WITNESS: No, he told me I had a physical condition here but about my head, he didn't say anything to me about my head.

MR. HANRAHAN: I think that is most--

THE COURT: Now, please, yesterday, Mr. Thompson, you told us that the doctor said to you that in thirty or sixty days you would be okay.

MR. GLEASON: That is it, that is what I was referring to.

THE COURT: What doctor was that and where was it?

THE WITNESS: That doctor told me thirty or sixty days I would be all right.

MR. GLEASON: That is right.

THE WITNESS: That is at the marine hospital, because Dr. Farr never told me anything.

THE COURT: It was the marine hospital doctor, then. And how long was that before you signed the release?

THE WITNESS: I left the hospital.

THE COURT: Now, that is very easy.

MR. HANRAHAN: April 28, 1950.

THE WITNESS: I signed the release when?

MR. HANRAHAN: June 2.

THE COURT: Just one month.

MR. GLEASON: One month prior.

(237) THE COURT: So, a little longer than a month before he signed the release the hospital doctor told him in a couple of months you will be okay.

MR. GLEASON: That is right.

THE COURT: And that was probably substantially what Mahoney and the insurance men said, that he should sign it now because he was well, according to this testimony.

MR. GLEASON: That is right, sir.

THE COURT: Now, it so happens that unfortunately, according to the present testimony, those advices given this man were in error according to the present testimony and the real question I have about the release is this: when a man signs a release under a misunderstanding as to his physical condition and as to whether he will be well, but he understands it is a release and he knows he is signing away his rights and he knows he can sue, is that release to be opened up for a seaman? I can tell you there would be a real question for the ordinary citizen; for the seaman I'm not so sure, and it is that point on which--not now but later--I would like to hear counsel.

MR. GLEASON: There is one case, your Honor, that is directly on all fours.

THE COURT: What is that?

MR. AXTELL: This Bonici Case.

THE COURT: Let's not go into that, counsel. (23) I'll read the Bonici Case with care.

MR. AXTELL: Vernon Jones, he invented this release that makes a man write out everything: "I know it's a release, I know my rights are gone, I know I am giving up everything", and that came before Judge Congler and he reached the bench at that time and the case was that of a little man from that island down in the Mediterranean. He had a bursa calcification of one shoulder. It was an action for indemnity but the evidence was weak--

THE COURT: Please, Mr. Axtell, please let's not take time to go over the Bonici Case now. Did it ever go up?

MR. GLEASON: Yes, it went up to the Supreme Court of the United States.

MR. AXTELL: The Circuit Court of Appeals, if I remember, Judge Congler absolutely, because it was a mistake just as in this case on the part of the marine hospital doctor and the company's doctor, only in this case the company doctor was not so mistaken but he didn't say anything--

THE COURT: The reason I raise the question is, when you men plaintiffs cited the Bonici Case as holding that a release could be opened up if the injured man didn't know that he was not cured, the defense said they disagreed (239) with it and I thought they made some sense and maybe they do.

MR. AXTELL: Vernon Jones used to work for me in 1918 or 1920. He is now the head man of the department of personal injuries in this great firm of Kirlin, Campbell and Keating.

THE COURT: I know Mr. Keating very well.

MR. AXTELL: He thought he would find a way so these underwriters and shipowners could take advantage of these men and get them to sign. You can get a sailor to sign most anything when they come ashore.

THE COURT: I know they are wild when they get ashore.

MR. AXTELL: Anyway, Judge Congler said that release

is no better than any other release.

THE COURT: Now, may I suggest that we continue with our rebuttal on this witness.

BY MR. GLEASON:

Q You felt better when you came back--

MR. GLEASON: Was your Honor's discussion with counsel just now directed towards my not pursuing this line?

THE COURT: You use your own discretion.

Q At any rate, Mr. (240) Thompson, when you came back from Arkansas you felt better, did you? A Yes, I felt a whole lot better all but for right around where the wound was.

Q And when you signed the release did you feel that you were going to be well? A Well, it's according to what the insurance man, Mr. Mahoney said.

THE COURT: They told you that?

THE WITNESS: I was taking their word and of course I felt all right but I didn't know there would be a rebound on me.

Q What did you do down in Arkansas? Did you take hot baths and things like that? A No, I spent most all my time swimming in the river and fishing for a few days and eating everything I could get.

Q Did you skin any catfish? A I can skin them in two seconds and you know we have great big ones down there.

Q Do you like catfish? A I do.

MR. HANRAHAN: Did your Honor read the last exhibit?

MR. GLEASON: I would like this, your Honor, (241) to read this new medical phraseology. It looks like we've got something important here. We've got an "impression by way of osteomyelitis." Did you read that, counsel?

MR. HANRAHAN: I can read, "No evidence of fracture or prolonged increased intercranial pressure."

MR. GLEASON: That is text out of context.

MR. HANRAHAN: We have here: "There appears to be some widening of the soft tissue." This is dated very lately. This is dated March 2, 1954, no--this is very lately.

THE COURT: From what hospital?

MR. GLEASON: It is from the Stapleton Marine Hospital, your Honor, and 2/16 is the date of the request, 2/16, 1954, routine skull films. There appears to be some widening of the soft tissue shadows over the right parietal region. "Unfortunately on the two AP projections the left-sided soft tissues are obscured by artefact so that comparison cannot be made. Otherwise there is no evidence of fracture or prolonged increased intercranial pressure. There is physiological calcification of the choroid." Now, we have here, "Impression R.O. osteomyelitis of the skull." R.O., I presume that is right occipital.

MR. HANRAHAN: No. R.O. means rule out, rule out osteomyelitis of the skull.

(242) MR. GLEASON: I can't see that it's rule out yet. All I

say is, this does have, I think, perhaps in it some seeds of explanation for the present condition of this gentleman. I would like to have it in evidence so your Honor may see it in conjunction with the rest of the hospital records.

THE CLERK: It is in.

MR. HANRAHAN: I think it is important for me to comment that R.O.--I think your Honor should take judicial notice because we have evidence of what R.O. means.

THE COURT: How can I take judicial notice of a thing like that? If you had a doctor that came here and said that is what it meant.

MR. HANRAHAN: He did yesterday.

THE COURT: Not Dr. Farr.

MR. HANRAHAN: Dr. Farr did say when I read psychoneurosis, he said to me when I asked isn't it a record of psychoneurosis, "Yes, but look," he said, "R.O. means rule out."

MR. GLEASON: At least it connotes that they have in their minds that there is a suspicion of whatever it is, I don't know.

THE COURT: Well, they're looking for some clinical basis for what Dr. Farr says he thinks exists.

MR. HANRAHAN: I have no further questions.

(243) MR. GLEASON: That's all.

THE COURT: Recess for lunch until 2:15.

- NOON RECESS -

- AFTERNOON SESSION -

MR. HANRAHAN: It is stipulated between the parties that a supplemental Coast Guard report of employment in the form of a letter dated January 4, 1954, can be attached to the defendant's exhibit D-1 to make the record of employment subsequent to the Rosina Marron complete.

MR. GLEASON: It will be stipulated, your Honor, and this is to save time of the Court, that, if the pursers of the various vessels were brought, or the port captains of the various companies, shipping companies for the shipowners, were brought to court before your Honor in regard to the vessels on which Mr. Thompson sailed subsequent to the assault upon him they would testify they have not in their possession any records of any complaints by Mr. Thompson in regard to his head, and as a matter of fact, we will go one step further, and we will stipulate that if Thompson were put on the stand he would testify that he did not make any such (244) complaint but, by the same token, it is stipulated by defendant that Thompson would testify that the reason therefore was that he knew that if he did complain he would not be able to ship and that upon his being taken on board these ships it was understood between him and those who took him on that he would work through without complaints about his head if he could possibly do it.

We will stipulate he passed the physical examination but

with the proviso that he has already testified to that in certain instances at least he had agreements with the signing on doctor that he would keep the faith and work through.

MR. THOMPSON: That was only one doctor.

MR. GLEASON: That is on his last trip. I don't think it would serve the interests of justice nor would it help your Honor, and after all that's what counsel's duty is to do, both-- I don't think it would do either to bring a string of witnesses before your Honor to testify to that fact which we would freely admit, but would your Honor now indulge me with about three minutes or two minutes to make a 'phone call and I'll be right back.

(The record continued after informal discussion at the side bar.)

THE COURT: Would it be more satisfactory to you to go through the motions of reading them (245) (referring to depositions), or just stipulating them in evidence?

MR. HANRAHAN: I would lik. to read them.

MR. GLEASON: I would like to read them.

MR. HANRAHAN: Because the attorney can emphasize--

MR. GLEASON: I think it gives your Honor some cause for thought, at least as the reading is going on your Honor can admeasure them. That is, I think, in fairness to your Honor, I don't think it's fair to bring a bunch of depositions to a Federal Judge and dump them on his lap and say, "You do all

the work." I think we can do some of this work in bringing forward what we consider is important.

I will read one question and answer on page 2.

THE COURT: Whose deposition?

MR. GLEASON: I'm reading, your Honor, from the deposition of Matthew Caplis, taken--

THE COURT: He was the union representative.

MR. GLEASON: Caplis, taken on January 11, 1954, at the office of Silas B. Axtell. I will say, your Honor, that I examined him and Mr. Hanrahan cross-examined him and I will read one question and answer from page 2.

(At this point the deposition of Matthew Caplis, P-5 in evidence, was read.)

(Deposition of Mathias Schiffer, P-6 in [246] evidence, was read.)

THE COURT: Does the plaintiff have more depositions?

MR. GLEASON: No.

THE COURT: Then you rest?

MR. GLEASON: I rest.

(At this point there was a discussion as to how long the balance of the case would take.)

(There was a discussion with reference to proposed findings of fact and conclusions of law.)

MR. HANRAHAN: I offer in evidence the complete record from the Memorial Hospital in Corpus Christi from January 15,

1950, to February 10, 1950; record of New Orleans Marine Hospital from February 11, 1950, to March 18, 1950; Galveston Marine Hospital, from March 20, 1950, to March 21, 1950; Galveston Marine Hospital, March 25, 1950, to April 1, 1950; Staten Island Marine Hospital, April 19, 1950, to April 28, 1950, Staten Island, February 16, 1951, to April 20, 1951; Baltimore, June 11, '51, to July 1, '51; Staten Island, February 13, '52, to March 28, '52; Baltimore, March 29, '52, to April 19, 1952; and New Orleans from November 11, '52, to December 15, 1952.

THE COURT: I understand, counsel, that both your medical experts have already reviewed these hospital records and made and given their testimony in the light of (247) those records and the history.

MR. HANRAHAN: I think they are important and they should be admitted in evidence in toto. If there is any question what this man was actually treated for and what complaints he actually made even in spite of the doctors. The doctor would read pretty much from the first admitting note. They didn't go into the whole complete record. I'm probably being just a little technical but I would like them completely in the record. Is there any objection?

MR. GLEASON: I have no objection.

(Marked P-2 in evidence previously.)

MR. GLEASON: If the doctor based his finding on

anything at all, I have certainly no objection to it going in the record. I think it should go in. There are two findings of facts not in my original findings of fact; one is that the so-called release is ineffectual as such and void.

THE COURT: That is not a finding of fact, that is a conclusion of law.

MR. GLEASON: And another, both a finding of fact and conclusion of law, that it appears from the evidence--this is the finding of fact--that plaintiff now suffers from an organic brain disease caused by trauma in question. This is of a serious nature and permanent, and it appears from the testimony that the prognosis is that he will have this for the remainder of his life. It has (248) the manifestation and form of pains in the head and side of the head accompanied by flashes and a sensation of hot and cold down the side--the right side of the face and a dissatisfaction at all times with his present state, no matter what that state may be.

MR. HANRAHAN: I reserve my usual motions to be made until tomorrow morning.

THE COURT: Yes, sir, but now how much longer?

(At this point there was continued discussion as to probably length of the case.)

(Adjourned to March 3, 1954, at 10:00 a.m.)

(249) Newark, New Jersey, March 3, 1954, 10:00 a.m.

[Trial resumed pursuant to adjournment]

Appearances:

[Same as previously noted.]

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THE COURT: I understand that the present case on trial, Thompson versus Coastal Oil, is expected to conclude about at midmorning recess, is that correct?

MR. HANRAHAN: Yes.

I have a motion but before my motion there were two bits of evidence that were not expressly put in the record. Instead of putting Thompson back on the stand we're going to enter into a stipulation on one bit of evidence, the number of attorneys that this man had available to him, that contacted him and offered to take his case in the hospital. It is stipulated that about, on an average, three or four attorneys approached him at Corpus Christi, three or four at New Orleans, three or four at Galveston, and three or four at Stapleton, and there was one other thing that I wanted read into the record. I thought there might be some idea on your Honor's part that he has been wearing that bandage for some extended time. He has only been wearing the bandage for about, what, a week?

MR. GLEASON: Yes, since his last visit to (250) Stapleton Marine Hospital.

MR. HANRAHAN: I will be very brief on my motion.

I move, of course, to dismiss the complaint. First of all, from the defense point of view the most important thing here is the release and rather than go into any lengthy discussion of the release, I had my office prepare a further memorandum just on the question of release, and I would like to submit that and merely quote from one case that has not been brought to-- I will give you this as soon as I finish with it--that has not been mentioned before, which is only a District Court case but very similar to the situation here, and that is the case of McGraw against State Steamship Company. I have only an AMC citation, 1954, AMC 148.

That is a case where a seaman without an attorney--

THE COURT: Those just are not available here, counsel.

THE HANRAHAN: The AMC's are not?

THE COURT: No. We certainly could get it from the Advance Sheets. Can't you give us that?

MR. HANRAHAN: I will try to get the official citations by calling the office before we are through, and if not, I will mail a copy of the AMC's to your Honor or get it in to you this afternoon.

THE COURT: If you would just call me up and (251) give me the Advance Sheets citation that is much simpler.

MR. HANRAHAN: Sometimes the AMC reports are not reported on the subject. It is cited on page 8 of the brief.

THE COURT: Oh, it's on page 8 of your brief! All right.

MR. HANRAHAN: That is the case where the seaman was not represented by an attorney. He settled the case and then there was a medical change for the worse after settlement and the Court sustained the release, saying that "The evidence at the trial establishes the fact that libelant took the initiative in suggesting a settlement. In the light of the known medical history at the time, there was no overreaching on respondent's part. Libelant McGraw himself obtained the abstract of the clinical record from the marine hospital which showed that the libelant was then suffering from painless gross hematuria--etiology unknown. This record was further substantiated by the report from the Bluff Hospital, Yokohama, Japan, which was known to both parties."

I won't quote the rest of that language, I won't take more time in discussing the question of release. On the question of liability there are only three possible theories on which Thompson tries to or could possibly try to establish liability of this defendant, and the first is, if he was able to show that this was an assault by a (252) superior against an inferior.

THE COURT: That's got nothing to do with it.

MR. HANRAHAN: That is definitely out. Then on the theory of negligence under the Jones Act. That is on the theory of failing to protect other members of the crew from a man of known vicious propensities, and I think it is clear that there was no knowledge on the part of anyone. As a matter of

fact, all witnesses say this thing came as a complete surprise, they never anticipated that Medina would resort to such an act.

Now we come to the Keen theory. I must emphasize that the Keen Case was decided two years after this situation but that does hold as a proposition--

THE COURT: Two years after this situation. What has that got to do with it, if the Keen Case is law?

MR. HANRAHAN: In timing the Keen Case is not important in deciding the question of liability as it is in deciding the validity of the release because, whether that release was a good release, has to be decided as of the time the contract of the release was entered into, not looking back at it now. I would just briefly like to discuss the Keen Case. The Keen Case pretty well holds that if, in fact, a man of vicious propensities is employed aboard a ship that ship is unseaworthy, and if he commits an assault the ship is liable. Understand again the history (253) of that case, the District Court judge in charging his jury made the same statement, that the steamship company is not the insurer of the safety of the seaman aboard the ship. And Judge Learned Hand, on appeal, said that was a wrong charge, that if that man is, in fact, of vicious propensities, whether or not the shipowner knew about the ship's seaworthiness is immaterial, and the case was sent back for a new trial and there was never any definition of what a man of vicious propensities was.

I might say the man involved, who had a Polish name, in

the Keen Case was a man constantly drunk; he was known to be constantly picking fights; he was known--I mean it turned out later--they didn't actually know at the time, he was a man who habitually carried deadly weapons with him.

Now, when we consider the question of effeminateness, or let me assume for the moment--

THE COURT: Let me interrupt just a moment.

MR. HANRAHAN: I think it's important when you consider this particular situation to understand just how seamen are hired, how they are put aboard ships.

The Seamens' Union, particularly the National Maritime Union, is the greatest illustration of a closed shop operation. The operating man on the steamship company line telephones the union whenever a ship comes in, "We need so many replacements." They have a hiring (254) hall on 17th Street, New York, and they talk to the head man there. They have got so many cooks, so many A.B.'s, so many ordinary seamen. These men go up there with their cards, coming up for employment, and they are sent directly to the ship.

Now, the Keen Case more or less holds that theory--well, it's based upon a theory of liability without fault unseaworthiness.

THE COURT: I take it that the principle is if a plate in a ship side has a latent defect which causes danger--damage to the ship and damage to personnel, the personnel recover for

unseaworthiness.

MR. HANRAHAN: Right.

THE COURT: Therefore, by the same token, if there is a latent defect in personnel which causes damage to other personnel, there is similar unseaworthiness.

MR. HANRAHAN: With respect to unseaworthiness of the ship's appliances and defective booms or defective winches, and even in the case of a ship being unseaworthy, where a man is in fact a man of vicious propensities always carrying deadly weapons, always assaulting, being rude and abusive to other men, there is an element of control there; at least the steamship company had a chance to buy a good boom from a shipyard; they had a chance to repair it; they had a chance technically to make an (255) investigation into the background of a seaman who is sent to them, but as a practical matter it would be very difficult. But to hold in this case that because a homosexual is put aboard a ship makes the ship unseaworthy would put a burden on the steamship company that would be overwhelming; it would be, in fact, implying that every man that is sent down by the union has to go through a psychiatric examination. In other words, to hold a ship responsible for an assault by a man who had a squeaky voice or wiggled his hips as he walked or was known by feminine names would be just a tremendous burden.

It's a different situation where in fact the man is vicious and I again wish to remind your Honor that while this man was

effeminate his complete past history, his Coast Guard record, and the rest, are completely barren of any act. In other words, a homosexual is not a man of vicious propensities. The other aspect of that is a man--

THE COURT: Well, now, perhaps we can get at the matter more concisely if I ask you a couple of questions along that line. I agree that as I sit here, not a psychologist, without psychiatric advice, it is difficult for me to reach the conclusion that the mere fact that a man may be a homosexual by the same token means that he is more apt to be dangerous to his colleagues in the way (256) of using meat cleavers. It may follow but it may not and I have no proof before me. In other words, it might be that on proper proof the rule might be recognized that a homosexual was per se unseaworthy. I don't think so far that that has been established but you do have here this situation. Here is a man that is--let's forget his homosexuality, his homosexual tendencies, here is a man who on your theory was falsely charged with doing a homosexual act. Now, instead of resenting that by words, what did he do? He went out and got the key to a place where the meat cleaver was properly kept, got that, hid it under his shirt, lay in wait in the dark where he knew the man who had made this allegedly false charge was going to pass, and three times sought to crash his skull with the edge of that meat cleaver. A definitely premeditated murderous intent raised by the fact that a false

charge had been made. Now, do you think that is the normal character of the average seaman?

MR. HANRAHAN: Seamen are a pretty rough bunch.

THE COURT: Do you think that is a normal character of the average seaman?

MR. HANRAHAN: I think that is a normal characteristic of any man--

THE COURT: I don't. I think--well, that seamen may be rough and ready; they might well take their (257) fists to a man but to premeditatedly murder the man with a meat cleaver just, I think, is a terrible blotch to put on the escutcheon of any individual seaman or otherwise.

MR. HANRAHAN: That is an important thing, I agree. In other words, the definition--

THE COURT: Therefore, I think that this man had unusually vicious propensities. Now, if he has, doesn't the Keen Case say that he made the boat unseaworthy?

MR. HANRAHAN: If, in fact, he had, but I was going to say--

THE COURT: Don't actions speak louder than words?

MR. HANRAHAN: There has not been too much by way of Court decisions on the definition of vicious propensities. The Keen Case merely sets down roughly that if, in fact, the man has vicious propensities, the ship is unseaworthy. His background was known, it was dealing with one who had many

fights and assaults and incidences of brutality. The only other case following the Keen Case is the Jones Case, which is cited in many of the briefs, and there they held that this wasn't a case of vicious propensities but said, by way of dicta, where we define vicious propensities and held a man was so vicious, or where there was a long history of almost (258) a criminal nature, fighting people, and in one instance, I say where a meat cleaver was used--I don't think as a matter of law one instance where a man who has lived a life--I have forgotten how old Medina was but say he was twenty-five or thirty years, he had had a life of twenty-five or thirty years.

MR. GLEASON: Twenty-eight.

MR. HANRAHAN: Barren of any instance of violence, who is in some way provoked to an attempted murder. I don't think he fits the definition of vicious propensities. I think that is a man that gives a history that is shown over the past.

THE COURT: Fellow, if this was a casual occurrence where in the heat of passion at this charge the meat cleaver had been lying there alongside of him and he picked it up and had gone whacky, there might be something in what you say, but this was a very carefully thought out plan.

MR. HANRAHAN: From the time he left the meeting.

THE COURT: Yes.

MR. HANRAHAN: A matter of minutes, no half hour or so.

THE COURT: You know what a murder charge is on premeditation.

MR. HANRAHAN: Well, that is my motion, your (259) Honor.

THE COURT: I think I am a little more concerned with your argument on the release but I think we must hold the matter as usual for the conclusion of the case in the light of the facts. The fact that further evidence in that regard, I understand, will be forthcoming from you.

MR. HANRAHAN: I just remember your Honor thought that the important thing here was whether the man was induced to believe he was well. Your Honor, the question he answered late yesterday afternoon that Dr. Farr never told him anything about his condition--that was in the hospital.

THE COURT: I have in mind the testimony in that regard.

MR. HANRAHAN: I presume your Honor is reserving decision on my motion?

THE COURT: Yes.

MR. HANRAHAN: Call Mr. Barron to the stand.

V I N C E N T F . B A R R O N , called as a witness in behalf of the Defendant, being duly sworn, testified as follows:

THE COURT: I am assuming, Mr. Hanrahan, that you have given a copy of this release memorandum of yours to the other side.

(260) MR. GLEASON: Yes, he has.

THE COURT: So, I will hear from the other side shortly if they have anything to add. I don't mean now.

MR. GLEASON: I didn't stand and ask your Honor's permission to talk at this time because I think we can very well talk this over--

THE COURT: Not necessarily at this time, but I will want to hear from you later more on the release than the other angle.

DIRECT EXAMINATION BY MR. HANRAHAN:

Q By whom are you employed? A By the Maritime Adjusters.

Q Back in 1950, by whom were you employed?

A Shipowners' Claim Bureau.

Q Will you tell his Honor just what the Shipowners' Claim Bureau was or is? A The Shipowners' Claim Bureau handles many seamen's cases, particularly do they handle claims, not only seamen's claims but cargo and immigration matters as well.

THE COURT: For shipowners, themselves?

THE WITNESS: That is right.

Q You are a claim adjusting bureau for several steamship companies, is that right? (261) A That is right.

Q And in June of 1950, did you have some negotiations with plaintiff here, William Thompson, pertaining to settlement?

A I did.

Q And could you tell us on how many times you saw Thompson? A At that time I saw him twice, as I best remember.

Q How was it that he came to you? A He came over because he had what he believed was a claim against the shipowner and he wanted to come over to discuss settlement.

Q He had been referred by one of your clients?

A Yes, he had been referred by Sieling and Jarvis.

Q Now you say you saw him twice. Would you concern yourself with the first meeting. Can you recall approximately how long it took? A Yes, I can recall it very well. Mr. Thompson and I were in a particular room. He came over and talked about his claim at that time. He said at that time he wasn't feeling so very well. He did discuss settlement figures with me. We didn't get together exactly on anything at that time but Mr. Thompson thought it would be best for him if he went to Hot Springs, Arkansas, I think it was, and took some baths down there. He said somebody had (262) told him those baths would be beneficial to his well-being.

Q Was any figure mentioned to you by Mr. Thompson at that first meeting? A I think first he mentioned fifteen thousand and then he came down to six thousand.

Q This was the first meeting? A That was the first meeting, yes.

Q Did you ever have him examined by Dr. Farr?

A Yes, I did.

Q And Dr. Farr reported, rendered you a report?

A He did, yes.

Q And was that report available to you at the first meeting? A I don't think so.

THE COURT: Was it available after the first meeting and before the second?

THE WITNESS: Yes, it was.

Q Even at the second meeting did you have any discussion with respect to Dr. Farr's report with Thompson himself?

A Yes, I did. Well, as I remember it, Dr. Farr found he had a 10 per cent permanent disability of his body and I made that known to Mr. Thompson.

Q How did you make it known to him? Did you read the report? A I read that portion of the report to him, I think it (263) was the conclusion that was found by Dr. Farr as I remember the report.

Q Do you recall whether Dr. Farr said that the man could go back to work in June or did he give him any extended convalescence? A As I remember, Dr. Farr gave him a little more time than what the marine hospital had given. I think Dr. Farr gave an extra month, maybe two months.

Q Did Thompson, himself, bring a discharge from the marine hospital? A Yes, he did, he had that.

Q What went on at the second meeting? A Well, Mr. Thompson came back, I presume from Hot Springs, Arkansas,

where he had gone to take the baths, and we resumed discussion and he agreed to accept the four thousand dollar figure, I think it was, that I offered.

Q And the release was entered into?

A And a release was entered into.

Q Now, in this discussion as to amount to pay on the case, was there any consideration discussed of the period of disability, the period of maintenance? A Well, there was a very brief period of maintenance, as I remember it, which didn't amount to anything, maybe to, roughly, about two hundred dollars.

Q You mean for outpatient treatment?

(264) A For outpatient care, and in our talk discussing the thing back and forth we discussed the possibility, of course, that if he could not substantiate his claim he would be entitled to no more than the two hundred dollars.

Q You mean if the couldn't establish liability.

A That's right, yes. On the other hand, it was also discussed mutually between the two of us, the possibility of him getting more than four thousand dollars if he were able to substantiate the liability in court, if he got before--well, if the facts were such and the Court so found, he might get more than four thousand dollars, he understood.

Q In other words, there was discussed the alternative to settling the case, that is, suing? A Oh, absolutely. He told me he had seen lawyers and so forth, himself, and there was no

question at that time that he didn't--in fact, he told me certain lawyers expected to get, oh, much more than fifteen thousand that he originally mentioned.

Q Did he mention, or shall I put it this way: did he give any indication to you as to wanting to try the case or wanting to avoid the trial of the case? A Yes, in general I would say he wanted to avoid trying it because, well, as you undoubtedly know, it's a very personal matter. He said he didn't want to go through (265) this kind of business about homosexuality and all the rest of that stuff in court if it could be avoided. I wouldn't either.

Q Did you at any time tell him that he had completely recovered or that he was well? A No, I did not.

Q As a matter of fact, you told him what Dr. Farr said? A I told him what the doctor told him and that was it. I am not a doctor and all I could tell him was what the doctor told him and let him make up his own mind.

MR. HANRAHAN: You can cross-examine.

CROSS-EXAMINATION BY MR. GLEASON:

Q Mr. Barron, how long have you been doing this kind of work with shipowners and underwriters? A Well, in adjustments since I got out of the Army in '45.

Q And literally hundreds and thousands of cases have gone through your hands, haven't they? A That's right.

Q You are not scared of medical terms, are you?

A Not too much.

Q You don't know what a medical term means--you can go to a dictionary and look it up. A I can pick up a 'phone and call a doctor.

(266) Q And if I were doing defendant's work and as I used to, of course, and you know me and we were talking together about how much a case was worth and I said to you, "Well, there is encephalopathy there," you would know what I meant, wouldn't you?

A In general.

Q As a matter of fact, you would probably know a lot more about it than I would.

THE COURT: Modesty forbids.

Q Are you an attorney? A No, I am not.

Q By the same token you know all these medical terms and know all their connotations and are familiar with most of the injuries that seamen get anyway. You are also familiar with the law in regard to liability of ships and shipowners, aren't you, sir?

A I believe so, yes.

Q Now, when Thompson came to you did you believe that he had a good case against the shipowners? A I didn't believe he had a good case against the shipowners, no.

Q Did you tell him that? A I feel I probably--well, do you want a direct answer to that?

Q Well, I don't care, direct or not. You and I are (267) friendly enough so we don't have to have a quarrel. A What we had, actually, was a discussion of the pros and cons rather than a

directive from me that he was not entitled to a dime. We discussed the possibility of him not getting anything and we discussed the possibility of him making a better figure than what I was willing to pay in settlement.

Q Would you say, Mr. Barron, that in the course of that conversation, that whatever you told him in regard to the possibilities of getting anything on liability was rather discouraging, is that right, sir?

THE COURT: Did you tell him?

THE WITNESS: We talked about both features of it.

THE COURT: Did you tell him what your thoughts were as to the law?

THE WITNESS: Yes, I did, your Honor.

THE COURT: Which were weak, that he had a weak case?

THE WITNESS: I felt he had a fairly weak case, yes.

Q And as his Honor has just asked you, you communicated that to him, at least that your thoughts were that he had a weak case. Is that right, sir? A Yes.

(268) Q Did you discuss this encephalopathy with him?

A No, I don't believe I did.

Q You had access at that time to the hospital records?

A I just had the clinical abstract, not the hospital records.

Q And the clinical abstract, does that have anything of the Marine Hospital at Stapleton, Staten Island? A Yes, it does.

Q And right there in bold type is encephalopathy due to trauma. That's right, isn't it? A Yes.

Q And that we know is not just concussion, is it?

A It is not just concussion, no.

Q It is brain damage? A By terminology, yes.

Q You knew that? A Well, I sent him to Dr. Farr for the very reason I wanted medical information more expert than myself.

Q Do you follow the trials in the Southern and Eastern Districts in regard to injuries? A Yes.

Q Do you remember the Kueto Case that I tried?

A No.

Q It is a famous case and it's written up, not that I'm famous, but it is written up as being famous, advocating a tentative (269) law. Now, did you read that at all? A No.

Q Did you discuss the case with anybody?

A This particular case?

Q The Kueto Case. A No, I say I never read it.

Q Don't you know that in that case counsel so-called rang the bell on encephalopathy and got sixty-six or seventy-six thousand dollars, didn't he? A I don't know.

Q Well, if you followed any of these encephalopathy cases--

A No, not in general, no.

Q Not in particular. You know of your own knowledge, and you knew then, Mr. Barron, that fifty thousand dollars and sixty and

seventy-five thousand dollars is not unusual in a proved encephalopathy case. That is right, isn't it? A No, it is not.

Q And you knew that in this case there was encephalopathy due to trauma diagnosed by the Marine Hospital. A I knew it was so diagnosed by the Marine Hospital, I guess.

Q How did you make up this four thousand dollars? Tell us the workings--I won't want to go into your business because I know it's a highly skilled and highly specialized (270) business but, not telling any trade secrets, sir, how did you get--arrive at your four thousand dollar figure, or how was it arrived at? A As I told you before, when I first discussed it with Mr. Thompson he made mention of the figure of fifteen thousand dollars which was the figure which he sought in order to settle the case. After discussing it with him, he came down to six thousand dollars. My thought was four thousand dollars because of this: in the first place he had something approximating two hundred dollars in maintenance, he had lost at that time about five or six months' base wages and overtime, which would have run about to two hundred and fifty, or maybe a little better a month, so his total special damages could not have been more than two thousand dollars, at tops, if, of course, there was any liability at all.

If there was no liability, he would be entitled to about, again about two hundred dollars, and that would be it. So, assuming there was, for the purposes of settlement, only that there was apart from liability in the case, he would get special damages which would

make it about two thousand dollars. I realized, of course, that the cost of defending a case in court--I know it costs you money to hire lawyers and so forth. Mr. Thompson, himself, gave a figure of six thousand dollars (271) as a figure which he would be willing to take right then and there, and he had, as he said, spoken to attorneys about the case and so forth. So I pointed out to him that if he were to accept four thousand dollars in settlement he would probably be saving some money for himself because most attorneys, so far as I know, take at least one-third of any figure in settlement; some take forty per cent; some take fifty, but the average runs to about a third and if he were to take about four thousand dollars he would be getting as much with four thousand as if he had retained an attorney and paid an attorney the other two thousand dollars. I thought, too, if we were to pay over four thousand dollars it would be worth our while to go to court and fight the thing. All we could lose--well, we had a two hundred dollar item that we were going to definitely be out, as far as I knew, from there on it was a question of the jury to determine the amount of the man's damages, if he is entitled to any, and at that time it didn't appear to me there was too much liability on the ship's part.

THE COURT: Well, then, to make a long story short, discounting the question of liability, discounting the attorney's fees, both of which are substantial items, you allowed him two thousand dollars for his disability, his brain disability, brain damage?

(272) THE WITNESS: If he had any.

MR. GLEASON: That is right.

THE WITNESS: That is right, if he had any, your Honor.

MR. GLEASON: Don't call me "your Honor." There is his Honor, there.

THE WITNESS: I just spoke to him.

MR. GLEASON: There is only one place I am called that and that is when I'm sitting at my own court.

Q Mr. Barron, you know Joe Gibson, don't you?

A No, I don't.

Q The claims agent for the Luckenbach Line?

A No, I don't.

Q Let me ask you this: is he alone in sending seamen to lawyers when he is going to try a case? Or let me put it this way: isn't it sort of the practice among you gentlemen who are in the underwriting business, or managing these cases for shipowners, when you get a case that involves some serious injury like knee injury, semilunar cartilage, or something like that, isn't it the usual thing to send that man to a lawyer before you settle with him?

A It certainly is not.

Q You have never done that? A Never done it, no.

Q Don't you think it might be a wise thing to do, let's get that thought.

(273) MR. HANRAHAN: I think we're getting off the track

with a question like that and I object to it.

THE COURT: I don't suppose the Court is interested as to his views as to whether it is a wise thing to do.

MR. GLEASON: I guess not.

THE COURT: The real question is whether the settlement is fairly arrived at and that is sort of a mixed question of law and fact.

Q You knew, did you not, Mr. Barron, that this man had little education? A No, he impressed me--I don't know how much formal education he had but he impressed me with being a highly intelligent person.

Q Did you think at that time that he knew what was liability? A I certainly did.

THE COURT: Did you think he knew the Keen Case?

THE WITNESS: No, sir, I didn't know the Keen Case myself at that time; that was two years after.

Q There were forerunners of the Keen Case, weren't there? A To my recollection, not, no.

Q The Keen Case was not picked out of thin air, was it? A Again, sir, you're asking me for my opinion. My only opinion of the Keen Case is, of course, something that has (274) nothing to do with it.

THE COURT: Well, all right, if neither of you knew the Keen Case then you were both going on the basis of a mutual mistake of law.

MR. HANRAHAN: The Keen Case wasn't decided then.

THE COURT: Then you were both going on the basis of a mutual mistake of law if the Keen Case is good law, and I think it is.

Q Mr. Barron, you were mistaken in your views of whether or not there was liability in the set of facts such as this.

A No, I was not.

Q Your thought then-- A I didn't bring this Keen Case into it, I mean in this conclusion. Now, I don't think I was wrong at that time because even under the circumstances as they were given to me this was not at all on all fours with the Keen Case in any manner, shape or form.

THE COURT: In your judgment.

THE WITNESS: In my judgment, yes.

Q In what way was it different? A It was different in this respect: in so far as we know from information at hand--

THE COURT: Well, whether he thought it was or (275) not is relatively immaterial.

Q Now, Mr. Barron, there was, was there not--at least there was not a meeting of the minds. Let me put it this way. There was some mistake in your idea that there couldn't be any liability here. That is right, isn't it?

THE COURT: There might have been.

A I didn't say there was no liability, I judged the both extremes: on the one side, none, and on the other side, full liability. Mr.

Thompson did, too.

Q When his Honor was asking you about mutual mistake as far as liability was concerned, there is another phase here that I would like to inquire into and that is, wasn't there a mutual mistake between you and Mr. Thompson about the prognosis of his injuries?

MR. HANRAHAN: I have to object to these questions about a misunderstanding. There is no basis for the fact that there has been a misunderstanding. What is the mistake?

THE COURT: I suppose that again is based upon the question of whether Dr. Farr was mistaken.

MR. GLEASON: That is right, sir.

THE COURT: If Dr. Farr was mistaken, and the prognosis was essentially more serious than Dr. Farr decided, then since you, Mr. Barron, accepted Dr. Farr's prognosis, would you not have been mistaken? Isn't that (276) the proper question?

MR. GLEASON: Indeed it is, sir.

THE COURT: Now read it.

(The reporter reads the question.)

THE WITNESS: I would have been mistaken if Dr. Farr's prognosis was wrong. My evaluation would have been other than it was.

Q Your evaluation of the case and the amount that should be paid. A And of the consideration, yes.

Q In other words, let's not mistake my cross-examination.

Anyway you were not trying to do this man out of anything?

A No.

Q That is right, you wanted to do your job in a conscientious way, is that right? A Yes.

Q You wanted to represent the shipowners and you wanted to represent the club or whoever you worked for. You wanted to be fair to them and you also wanted to be fair to the man who ships, who goes down to the sea in those ships. A That is right.

Q And you took Dr. Farr's thought, so I'll say--because you took Dr. Farr's thought that this man would very soon be able to go back to his regular work, you evaluated the (277) case as you said, at four thousand dollars, really giving him about two thousand dollars for this damage, is that right? A No, that is not right.

MR. HANRAHAN: I think that question is impossible to answer unless he defines what he means by "very soon." Ask him what Dr. Farr prescribed for him.

Q It certainly was not in your mind that this gentleman about two years ago would have to give up being a sea cook, or a cook of any kind, was it? A No, it was not.

Q You expected him to be able to go on or go to sea as a cook or second cook and draw the salary that such a worker gets, is that right, sir? A That is right.

Q Now, of course, if you could have looked forward to the fact that this gentleman was not going to be able to do that but would have to give up cooking at sea because his head would not let him,

the pain in his head, and the flashes that came on near the hot stove, would not allow him to go on, you would not have evaluated the case as you did, would you? A No, sir, if I thought it was the direct result of injuries sustained on that ship, no.

Q And again, and in addition, if you had the foresight, (278) the giftie gie, as Bobby Burns says, or something like that.

THE COURT: O wad some power the giftie gie us,

To see oursel's as ithers see us!

It wad frae monie a blunder free us, And foolish notion:

What airs in dress and gait wad lea'e us,

And ev'n devotion!

MR. GLEASON: I guess I've got it wrong.

Q But if you could have foreseen that this would be his personality today, and I'm going to describe it to you, I'll try not to be dramatic although I love to be--when he sits there, you see him over there? A Yes.

Q He wants to be some place else and when he's eating ice cream, these are his words to me, he very often wants to leave it and go out on the street just to walk up and down, and when he's on a ship, he wants to be ashore, and when he's at a ball game, he wants to be home.

MR. HANRAHAN: I have no object to any question that assumes what is seriously in dispute here, the extent of this man's physical condition right now and whether or not it's due to the accident. That has been in dispute all throughout the

trial.

THE COURT: Assuming there is testimony (279) substantially, not specifically, to that effect.

Q Assuming that, Mr. Barron, if you had known at that time that this would be the personality of this man, that his psyche, as we have discussed it with Dr. Farr, would be damaged to the extent that that was his personality, he was being pursued by himself all the time, as we call it in the vernacular, eating himself up, you would not have evaluated the case as you did, would you?

A Not if I had that gift of prophesy.

Q As a matter of fact, Mr. Barron, you wouldn't have allowed him to take the four thousand dollars, would you?

A If I could foresee the future and those were the facts.

Q You would have said--and thank God there are people even against us--I know you would have said, "Look, you may want to take this money but you go get yourself a lawyer because you're going to be a sick man." That you would have said to yourself and you would have said it to Thompson, wouldn't you?

A I probably would have, yes, sir.

MR. GLEASON: Thank you.

REDIRECT EXAMINATION BY MR. HANRAHAN:

Q Are you a prophet? (280) A I am not.

Q Are you clairvoyant?

THE COURT: Nor the son of a prophet.

Q On this question of the Keen Case, it is important now

in your work to keep abreast as best a layman can with recent decisions respecting seamen. That case was decided some two years after the release was obtained. A That's right.

Q And the Keen Case has the effect of rendering the ship unseaworthy if, in fact, the man has vicious propensities and is employed as a seaman? A Right.

Q What was your understanding of the law prior to that? A At that time--of course law is always questionable, if there are two lawyers in Court one sees it different than the other one does. In any event, to the best of my knowledge--

THE COURT: Now I'm not interested in what the law was at that time. It's clearly manifest that the law was different.

MR. HANRAHAN: Right.

THE COURT: As it was understood and that is enough.

Q Was the question of notice of the man's vicious propensities necessary in your understanding of the law existing (281) at that time to-- A It was.

Q You were given a lot of factual data on this case, is that right? A Yes.

Q Reports of the Coast Guard and reports taken by the ship. A We had considerable.

Q All that sort of thing and I imagine you had a statement from Thompson himself, is that right? At least he gave you a story. A He did give me a story and I made notes on what he told me. I never got a complete signed statement from him personally.

Q Now, from the reports, from his statement, was there a serious question in your mind as to notice on the part of anybody responsible for this ship of a man with vicious propensities?

A Definitely.

Q Was there any indication in the reports that Medina was a man of violence? A No, there was not; Mr. Thompson so indicated.

Q He himself indicated that? A He did not indicate--

Q He was quite surprised that such a thing came from

(282) Medina? A That's right.

THE COURT: Doesn't it come to this: the understanding of the profession and of you as to the law at the time that you conferred with counsel now turns out to be wrong. You told Thompson wrong innocently, also as it now turns out depending upon how the Court looks at the facts as to the injury, you took Dr. Farr's word, or report, and you told Thompson that he was in a much less serious condition than he now may possibly be, and if that possibility is correct, you, therefore, told Thompson wrong as to the medical fact innocently, is that correct?

THE WITNESS: That is true.

THE COURT: Therefore, innocently Thompson instead of getting advice from his own side only got advice from the defendant's side which though innocent was wrong. Is that right?

THE WITNESS: It is possible, your Honor. Of course

I don't know what advice he got on the outside.

THE COURT: Now, here's something that is none of my business but something which I think you might want to think over. If you had not given Thompson this advice on the law, on the medical facts, and Thompson had just gone ahead upon his own judgment and upon the basis of (283) the Stapleton Hospital report which was more or less like Farr's and had gone ahead and made the settlement when he could have obtained lawyers, plenty of them, and when he had in the past settled little cases himself, so he knew what a settlement was like, then we might have a very different situation than we have now under the circumstances, under the Sitchon Case, because there there would have been no misrepresentations even innocently by someone acting for the shipowner, but that wasn't what happened.

THE WITNESS: That is not what happened, your Honor.

MR. HANRAHAN: All this talk about legal advice, did you discuss the law with him or did you just tell him he could have won the case or could have lost?

THE WITNESS: I told him he could win or lose.

Q You didn't discuss-- A We did discuss the possibility of him winning as respect possible liability, and we discussed the possibility of him losing.

Q And you told him--

THE COURT: You told him your feeling about it, that he had a rather weak case?

THE WITNESS: I did, your Honor, that's right.

(284) Q But the clinical hospital report that you got from the Marine Hospital you got from him, didn't you? A Yes, he did bring that with him.

MR. HANRAHAN: I have a short deposition I would like to read. This is a deposition taken by plaintiff's attorneys and it is the deposition of Cornelio Rudon Pozo. It is taken at the office of Silas Axtell, 15 Moore Street, New York, on April 29, 1953.

(At this point Mr. Hanrahan read from D-6 in evidence.)

MR. HANRAHAN: The man has broken English but I think you can understand what he has in mind.

THE COURT: That is just what I said to you before, counsel, if this had been a sudden act of grabbing up a cleaver, that is one thing, but this was a carefully planned out proposition and carried out according to plan.

(Mr. Hanrahan continues to read.)

(There was a recess at the conclusion of Mr. Hanrahan's reading.)

(After recess Mr. Hanrahan read the deposition of William Schopf, D-7 in evidence, deposition taken February 9, 1954.)

THE COURT: Let me interpose. The more I think of

it as you gentlemen are trying the case, the less important it seems to me to be whether or not the outright (285) homosexual act occurred because if it did occur then the charge that precipitated the attempted murder was a true charge. If it didn't occur, it was a false charge. Now in either event, should such a charge result with a normal seaman in premeditated murder with a meat cleaver--go ahead.

(Mr. Hanrahan continues to read.)

MR. GLEASON: Most of this cross-examination was just searching. I don't want to belabor it.

THE COURT: Let Mr. Hanrahan read everything he wants.

(In the course of the reading of the deposition of Schopf:)

THE COURT: Wasn't Schopf the man who was claimed on the one hand to be a third party in this?

MR. GLEASON: Yes, sir.

THE COURT: So he had a motive.

MR. HANRAHAN: Do you think if a man was involved in a thing like this he would come in and testify? He would get himself lost.

THE COURT: I think if a man was forced to come in and testify he would try his best to minimize anything which he participated in.

MR. HANRAHAN: He wasn't subpoenaed, he came in voluntarily.

THE COURT: You mean to say he came in to this

(286) office voluntarily?

MR. HANRAHAN: Absolutely.

THE COURT: Well, he certainly didn't do so from the clear sky.

MR. HANRAHAN: I think this whole thing was so insignificant that that is why the man doesn't remember.

THE COURT: Legally I think it is insignificant.

MR. HANRAHAN: I am sorry.

THE COURT: Factually it was what started the train of fire that ended in the explosion.

(Mr. Hanrahan continues reading.)

THE COURT (In the course of the reading): When was this Coast Guard report dated? Was it after these men were brought ashore or before?

MR. HANRAHAN: I don't have any record.

MR. GLEASON: It must have been after. We have the date of the report.

MR. HANRAHAN (After completing reading): That is the end. That is the defendant's case, and I renew my motion made at the end of the plaintiff's case.

MR. GLEASON: There is just one thing, your Honor, I would like to have a concession by counsel that the captain is shoreside and available.

MR. HANRAHAN: I don't know that.

THE COURT: Could the captain add very much,

(287) anyway?

MR. AXTELL: He lives on West 20th Street.

MR. HANRAHAN: Can you get him here? You had a right to subpoena him.

MR. GLEASON: I only thought of a captain as a sort of a window dressing, anyway.

MR. AXTELL: He said he didn't want to come over for anybody.

MR. GLEASON: I think we'll close the case without any more to do, your Honor.

MR. HANRAHAN: I think there is a failure here, your Honor, of one thing and that is to get into evidence, as evidence, the depositions. Here they are by stipulation going into evidence. Matthew Caplis, Mathias Schiffer--some are his and some are mine--if you will offer yours.

MR. GLEASON: I'll offer Matthew Caplis and Mathias Schiffer.

(Marked Exhibits P-5 and P-6 in evidence.)

MR. HANRAHAN: And I offer of Cornelio Rudon Pozo and of William Schopf.

(Marked Exhibits D-6 and D-7 in evidence.)

THE COURT: I don't know whether you desire to be heard but even if you do not I want to ask you a couple of questions.

In the first place you will remember we have a technical

question about the admissibility of (288) this Coast Guard report, and I called your attention to this late case of Gordon versus Robinson in the Third Circuit on the proper interpretation of this Business Records in Evidence Act. I don't know of any provisions requiring the Coast Guard to make reports, do you, gentlemen?

MR. GLEASON: No.

MR. HANRAHAN: Any requirement by law?

THE COURT: A requirement by law that the Coast Guard shall investigate and make reports.

MR. HANRAHAN: I'm not prepared to answer that. I know they always do.

THE COURT: Counsel, here we have been trying this case for days and you put in a report and you tell me you don't know.

MR. GLEASON: I think if you would ask Mr. Axtell that, I think, he has experience enough so that he could tell us once and for all whether there is.

MR. AXTELL: I think it is merely a bureaucratic function they are performing. They are controlling, and they have the right to license officers, deck engine room, that is their duty. They have the right to suspend those licenses. They have the right to revoke them, and they do conduct hearings and they have now the right to license what used to be unlicensed men, the deck men, (289) the engine room, and the steward's

men. I know of no statute which requires them to make reports. It is well known that they do make reports after hearings are held but they all relate to the question of whether or not the license of the man should be taken up or suspended. They are trying to discipline and improve our Merchant Marine by eliminating the men who are unfit to hold the rank of officers or seamen on board ship, and the license of this man Medina was revoked, I believe that is conceded, as a result of their investigation into this case. Sometimes they call witnesses, sometimes they send a man aboard a ship, they will send him even abroad, I believe. They fly him somewhere to some place where they have hearings.

I heard of one just recently in Yokohama. Sometimes you will find they use--what shall we call them?--warnings or admonitions and they probably keep a record that if a man, after disregarding a warning or admonition--maybe it's an assault case or something of this sort, they will take away the license and when they take away the license they give him a hearing, they are entitled to that.

I thought your Honor was asking for a specific citation of law. I know for a fact that the Coast Guard is a division of the Treasury Department and it is the police body of the Government to keep law and order on sea, and (290) I don't think there are any regulations issued by the Treasury Department which require that. There are certain things that have to

be on a ship, certain fire equipment and certain foods.

THE COURT: Keep your mind down to the question of making reports.

MR. HANRAHAN: If there is any violation of any of these regulations which have to do with ship supplies and misconduct aboard ship, there are other regulations that require that an investigation be made and by the code of regulations there are civilian attorneys who are employed by the Coast Guard as referees or judges and these men hold court in various places, as a result of which they have to make a decision, and by these regulations a copy of that decision must be given to the accused seaman.

THE COURT: Will you please cite to me the CFR which covers this case?

MR. HANRAHAN: I can't at this moment. I don't think it is that important.

THE COURT: I can assure you it is because, under the Business Records in Evidence Act, under the Gordon versus Robinson Case--

MR. HANRAHAN: I will telephone that to your Honor this afternoon.

(291) THE COURT: This Coast Guard statement cannot go in and I'll tell you just exactly why: because the rule under that Business Records in Evidence Act is that all that can come in thereunder is what the man making the report could testify to

himself were he on the stand.

Now, obviously, this Coast Guard officer who signed that report knew nothing personally about what happened either with regard to the cleaver or down in Pittaway's room, absolutely not. All he knew was what he was told by third parties and therefore any attempt of his to testify to that on the stand, or to report it in the Coast Guard report, would be pure hearsay and the report, therefore, is out in that regard.

On the other hand, if there is a specific duty on the Coast Guard under the CFR then you apply an entirely different criterion which, roughly, as I recall it, is this: what is the scope of the report as required by the regulations? Now, if the scope covers--if the report comes within the scope of the regulations then it goes in for what it is worth even though it involves hearsay, and that is why it is important to know.

MR. HANRAHAN: I will check that this afternoon.

THE COURT: Well, all right. Now we turn to another question and that is primarily the question of the release. As I told you, or perhaps before we get to the (292) release, you have the question of seaworthiness which counsel have--now I'm just telling you how my mind runs for you to fence to attack it and show that it is illusory. I quite agree that if a man has a true charge of immorality made against him, or perhaps a fortiori if he has a false charge of immorality made against him it gets him excited, and if he is a seaman, being

of the kind of the sea, not the pink tea artist, he might use his fists, but I cannot conceive that the average seaman, rough though he be, if he had either a true charge of immorality or a false charge of immorality made against him, would definitely and carefully carry out a premeditated murder with a meat cleaver, which is exactly what Medina did in this case.

Here is Pittaway with the same charge exactly made against him save that Thompson didn't think he was the constant aggressor from his effeminate character and Pittaway never did a thing. In fact, later on they were playing cards together, late that evening. So I would be glad to hear from you but it seems to me--now please, I just want you to make a mental note, it seems to me that there is here an unfit seaman of vicious propensities creating in the vessel an unseaworthiness just as if the vessel had a latent defect in a cargo boom or in one of its steel plates which injure the crew.

(293) That is my thought which I want you to attack. So we turn then not simply to the question of what the fact is as to the extent of damages--I must wrestle with that too-but assuming for the sake of argument that Dr. Farr was mistaken, and frankly I think the evidence shows that he was mistaken in his prognosis, and taking the word of Barron, your own witness, that he told Thompson of that mistake--I mean he told Thompson what Farr reported and that, in fact, was not true, innocently, then we have an agent of the defendant innocently

misrepresenting both the medical fact and as well the Keen Case law to this seaman which, in part at least, induced him to execute the release.

Now, if that is the case, then I think looking at both the Bonici Case and the Sitchon Case, on the first of which plaintiff relies, on the latter of which defendant relies, you don't have a release signed as in the Sitchon Case by a seaman who was given his own competent legal and medical advice, but you do have, as in the Bonici Case, a seaman who had, in fact, misrepresentations from the other side, and taking the language of the Sitchon Case, the Sitchon Case comes right down to this: After discussing the thing generally the Court said this:

> "The question in any case is whether the seaman, if he is acting alone as here, has intelligence (294) enough fully to understand the situation and the risk he takes in giving up the right to prosecute his claim, or whether, if he is acting under the advice, that advice is disinterested and based on a reasonable investigation."

Now, here the advice was not disinterested, it was interested and the man was certainly acting alone so far as his own advisers were concerned, so again taking the Sitchon situation, the Sitchon language, the Court says that it comes down to the question of whether the settlement was "fairly arrived at."

Now, in the light of the previous language about whether

the release was fairly arrived at, how can you say that it was fairly arrived at when the man had no advice of his own and when he got wrong advice from the other side. Please touch that. All that is concerned, but primarily the release point.

MR. HANRAHAN: I would like to start with the release first. Does your Honor feel--let's put it this way: in regard to the question of Dr. Farr being wrong, I can't see that at all. After all, the man has been treated in four marine hospitals.

THE COURT: Look, let me go right to that. I asked Dr. Farr right at the very beginning, I said, "Doctor, do you think Thompson is faking when he talks about these symptoms?"

(295) MR. HANRAHAN: He said no.

THE COURT: In other words, he said the man's symptoms are real, so the further question comes down to this: are those symptoms due in part even to this trauma, and as to that I have not the slightest question, not the slightest question.

MR. HANRAHAN: Neither do I. But did not Dr. Farr say in his report the man was permanently disabled, that he was going to have the effects of that trauma for a long time?

THE COURT: He said that was 10 per cent, and if that man is not more than 10 per cent, I'm no judge.

MR. HANRAHAN: We say that the law with regard to the release is not that the man has actually the complete picture medically and legally, but he has the possibility. Here is a man who had over twenty seamen's attorneys approach him

to handle his case.

THE COURT: Do you mean, then, if lawyers come to a man and he says, "Go away, I don't want you, I would rather deal directly with the company", that that man is in the position the same as if he actually had the advice of those lawyers?

MR. HANRAHAN: Certainly not in the same (296) position but it is not enough to throw out a release.

Now, the other question--

THE COURT: The question is, is the release fairly arrived at in fact? That is your own case.

MR. HANRAHAN: May I ask your Honor a question? If, in the future, a steamship company wants to continue settling these cases, what must we do that we have not done here?

THE COURT: I said that to Mr. Barron this morning, prefacing it by the statement that now I was saying what I had no business to do. Don't you remember my telling you that? I said to him, "Oh, fellow," in substance, "I have no question but what you acted innocently. I have no question but what you thought you were doing what was right." Now it turns out, and I'm repeating what I said to him, "that you weren't doing what was right because you were wrong in the advice you gave. Now," I said, "had you kept your mouth shut and had the man signed the release only on what he himself knew, that would be a horse of a very different color, but when he got it from you,

from the horse's mouth, then you've made the settlement unfairly arrived at because arrived at on an erroneous basis."

MR. HANRAHAN: You mean, your Honor, we should wait until a seaman comes in to us and says, "I (297) want fifteen thousand dollars", and give him fifteen thousand dollars and have him sign a release without talking to him? We must argue with him.

THE COURT: The real question is, isn't it, this: whether you should not say when a seaman comes in to you, "Now, old fellow, I should not advice you as to what a prognosis is in medicine, or as to what your rights are in law. You go get your own advice." And if he refuses, well, all right, then say, "All right, I'll sign you up." But don't, by any means, give him your advice.

MR. HANRAHAN: Your Honor, this is based on an agreement, the law of contracts, when two people fairly and at arm's length sit down and come to a meeting of the minds, that the thing is binding.

THE COURT: How do they come to a meeting of the minds, by your misrepresenting facts?

MR. HANRAHAN: What did we misrepresent?

THE COURT: I'm not going to repeat my words three times.

MR. HANRAHAN: The man comes in to us. He has with him an abstract from the marine hospital. It says right

there he knows he's got encephalopathy. He's got a head injury. He wrote these eight letters telling about the terrific pain. He thought he was(298) going to die he was hurt so bad. His head was split in three places. He knows that, he knows he was badly hurt. He comes to the company voluntarily with his own medical record from the marine hospital. He sits down and talks. "How do you feel?" "Not so bad. My head still bothers me, I get these terrific pains. I think I'll get well if I go away a little while, or people say I ought to go to Hot Springs."

"How much money do you want?"

"So much money, okay."

There was no overbearing with him.

THE COURT: Nobody charges you people with trying to defraud this man; nobody.

MR. HANRAHAN: Then he goes to Barron's office. He's armed with the records from the marine hospital. He has had the opportunity to hire all sorts of attorneys and he sits down with Mr. Barron and Mr. Barron says, "How much do you want?"

"Fifteen thousand dollars."

Barron says, "We're not going to pay any fifteen thousand dollars. You got a bad head injury. Our doctor says that you're permanently disabled."

THE COURT: Ten per cent.

MR. HANRAHAN: Ten per cent. Barron says, "I can settle with you or you can try the case. If you (299) try the case maybe you'll win, maybe you'll lose."

Was Barron supposed to tell him that he had a guarantee of a hundred per cent of winning this case, particularly when the law as it existed at that time indicated--

THE COURT: Barron should have kept his mouth shut on the medical and legal aspects if he wanted to win this case.

MR. HANRAHAN: Is not that the basis of the claim--I wish I had a plaintiff case in the casualty field. I could just go in and ask the casualty company for some money instead of negotiating, bargaining as to the respective merits with respect to liability and the rest of the people can do that by themselves.

I think our law, our system of Government intends they should do it themselves if they so desire and not be obligated to go to a lawyer. Isn't that so, your Honor?

THE COURT: You see, counsel, the trouble is you assume that Barron, a man with whom he is negotiating, and Thompson are on a parity. That is exactly what the law said he is not. That is not the case with these fellows who are afloat nine-tenths of the time.

MR. HANRAHAN: Your Honor, would it not follow that if the release in this case is set aside, that in (300) any instance where a seaman signed a release with a claim agent

who argues with that man about the liability features of his case, that release can be set aside? Wouldn't that be a fair statement?

THE COURT: I think he endangers himself if the seaman is not represented by counsel and doctors.

MR. HANRAHAN: I think that the effect of that would be for the steamship companies to do nothing more than to cancel the expense of Claim Departments and the rest and put a lawyer right on the staff and every time a seaman walked in say, "Sorry, we're not talking to you, start a lawsuit." And these courts would be so overwhelmed because 90 per cent of these seamen's cases are settled. It's to the advantage of the steamship company and the seaman that he gets a fair expeditious disposition.

Let's look at this, too--

THE COURT: There is a great difference, counsel, between a man like Barron saying, "No, sir, I'm not going to pay you fifteen thousand, I'm going to pay you four thousand dollars. Take it or leave it." If he said that you would have a very different situation, but he didn't. He proceeded to tell the man why he should not expect over four thousand dollars and there he misrepresented the facts and the law.

(301) MR. HANRAHAN: In this case, four thousand dollars was adequate settlement. Here is a man disabled and, at the time, it was debatable whether he could have recovered if he had sued

then. He might have tried his case--

THE COURT: I think that is ridiculous.

MR. HANRAHAN: And if he had sued in 1950 and his case was reached for trial prior to the Keen Case, the chances are--I say and I think counsel agree with me--are at least fifty-fifty that he would be out of court. He would have to prove that not only was Medina here a man of vicious propensities but that everybody had plenty of notice of it. It was a case of questionable liability back in 1950 when the release was entered. The man had been disabled five months in hospitals and say he would be disabled one more month.

THE COURT: Counsel, I'm very much interested if you can cite any cases showing the facts--showing the principle to be that a misrepresentation if innocent from the other side does not affect the validity of a release signed by an unrepresented seaman, but, barring that, let's stop the talk.

MR. HANRAHAN: May I have the brief I filed here (addressing Mr. Gleason)?

(302) MR. GLEASON: I'll have to find it for you.

THE COURT: This is your last brief?

MR. HANRAHAN: Yes.

This is the quote:

"The evidence at the trial--"

THE COURT: What page?

MR. HANRAHAN: Page 8.

"The evidence at the trial establishes the fact that the libelant took the initiative in suggesting a settlement. In the light of the known medical history at the time, there was no overreaching on respondent's part."

If I may stop right there. At that time Farr said he was worse off than the Marine Hospital.

THE COURT: Now, you just read the next page, please. I'm trying to save time because I have got another case coming in. The middle of the first quote.

On the next page, I'm reading from your brief:

"Respondent," namely the shipowner, "was in no better position to determine the clinical or medical (303) facts than was libelant."

That is not so, you were. You had Dr. Farr.

MR. HANRAHAN: But we said he was worse than the Marine Hospital.

THE COURT: You had Dr. Farr.

MR. HANRAHAN: What did Dr. Farr say? The Marine Hospital said he would be fit for duty in one month.

THE COURT: All right, but Dr. Farr was wrong in my estimation. It has turned out he has much underestimated the prognosis and you have here, "Based on the information in possession of both parties, the settlement was a fair one and the consideration was adequate."

Well, that may be at that time.

MR. HANRAHAN: "Subsequent developments showing the need for extended medical treatment and care were not anticipated by either party and do not control in determining the validity of the release."

THE COURT: I have not had an opportunity to read this case. What court is it from?

MR. HANRAHAN: I don't know. I think it is a West Coast case.

MR. GLEASON: It is a District Court case. It has not been appealed, as I take it.

(304) THE COURT: A difference is, I think, and I would think it was a sufficient one, that, in that case, the shipowner had no other basis to go on than the seaman and here you did, you had your own doctor make a special examination and he reached the wrong conclusion.

MR. HANRAHAN: Are we penalized for having Dr. Farr look at him?

THE COURT: If you insist to the man who is unrepresented that this erroneous conclusion of yours is right.

MR. HANRAHAN: I have nothing further to say, your Honor. I have that citation.

THE COURT: Is there anything else you would like to add on any other angle?

MR. HANRAHAN: I beg your pardon?

THE COURT: Is there anything else you would like to

add on any other angle?

MR. HANRAHAN: No, not at this moment.

THE COURT: All right. Now let's bear this in mind: you're going to give me the official citation of the McGraw Case, you're going to advice me of any Federal regulation or statute requiring the Coast Guard report, and, finally, I want both sides to give me their views on the quantum of damages. You have not alluded to that in the course of the case. My suggestion would (305) be that you cover what I have just alluded to in concurrent memoranda which you get over to me right away. Is that possible?

MR. HANRAHAN: Yes.

MR. GLEASON: May I just make this suggestion? That in regard to that Coast Guard report I frankly don't think it has much value in helping your Honor to come to a decision.

THE COURT: It may not have but as long as the defendant insists that I consider it, I have got to rule on the question.

MR. GLEASON: The trouble is, you will not be sitting in this case if this case is appealed; no matter how your Honor finds, it may find its way up to the higher court and you may be sitting on that court, but you might not.

THE COURT: The chances of that are not very good.

MR. GLEASON: These three gentlemen may say this is left out and that has a lot to do with the case--might have a lot to do with the case, and in which case we might have to try

this whole case all over, and I think that inasmuch as this has very, very little probative value, this Coast Guard report, inasmuch as it was not pinpointed to whether Medina was
(306) guilty or not--.

THE COURT: You waive your objection to its admission, is that it?

MR. GLEASON: I think that, Judge, with a court which is a lawyer and weighs the evidence and knows the probative value that he merely looks at some other person's impression and it won't make any difference, no determining factor in this case which is a different issue. I'm in favor of waiving the objection.

(After conferring)

Yes, sir.

THE COURT: That simplifies it from my standpoint.

MR. GLEASON: There is just one thing else I would like you to indulge me in taking a supplemental conclusion--finding of fact and supplemental conclusion of law. They are not really necessary but I would just like to supplement my conclusions of law with the changes that I submitted yesterday.

THE COURT: Has the defendant a copy?

MR. GLEASON: The defendant has.

MR. HANRAHAN: I don't want it.

THE COURT: Never mind, he says he doesn't want it. Therefore I still wait the McGraw citation and (307) your two

statements on the quantum of damages which I think you should give me in writing. Can you let me have them Friday?

MR. HANRAHAN: Yes, sir.

MR. GLEASON: You would not prefer to have that orally while its fresh in our minds?

THE COURT: I'm perfectly willing to have you give them to me orally now. I suppose if it's going to interfere with this other trial that's another thing. I always believe in striking while the iron is hot.

MR. GLEASON: Your Honor, may I therefore address a few words to you in regard to what it is my belief the plaintiff should be awarded in this case, if you see fit to award him damages?

The plaintiff was struck forcible blows by a deadly instrument. There is evidence here that not only is there encephalopathy, which is brain damage, physical brain damage, but there is testimony that there is damage to his psyche and that there was a contra-coup set up in his brain which has resulted-- the three of which have resulted in plaintiff being in this position now.

THE COURT: I would rather not say psyche because that draws visons--

MR. GLEASON: Yes.

(308) THE COURT: Let's call it a neuropsychiatric syndrome.

MR. GLEASON: Yes, sir. It has resulted in these

manifestations, or at least the plaintiff being this kind of a person today. He can work, yes, as a matter fact his innermost being tells him to work all the time, because if he doesn't work hard he doesn't sleep, and that is caused by the accident. So he rushes out, he rushes from place to place, from ship to ship, and he works as a dishwasher. Now, there is a monetary advantage in working as a cook. The advantage is at least two hundred dollars a month. And that is for the rest of his life.

There are also other advantages to being a cook, your Honor, and I think that by the time that we reach Thompson's age they are very valuable. It is the difference between being somebody and being nobody.

THE COURT: A petty officer or not.

MR. GLEASON: It's the same difference, your Honor, practically, as if, God forbid that it will ever happen, but if somebody were to tell me, "You cannot try cases any more." That's about the size of it. And believe me I would be licked. And so is Thompson licked. Yes, he can, he can be a watchman, he can be a dishwasher, but he is not there at his stove, and that is where he should (309) be.

I think it was St. Andrew, or somebody, that said--they were playing handball and I think it's very important in the thoughts of man--

THE COURT: St. Andrew was playing handball?

MR. GLEASON: Yes, when he was at some institute or something like that, learning religion. He was playing handball with a classmate of his who said, "If you were to die in ten minutes what would you do now?"

And Andy said, "I would go on playing handball because that is what I am supposed to do."

And I think that is pretty deep within a man. This man is supposed to cook. He's a good cook and, as a result of this accident, he is a dishwasher.

And again, and I think this is important, your Honor, this man was of an even disposition before this assault. He went ahead, he played cards, he had little diversions, he was of a strict puritanical turn of mind. There is no doubt about that. But there are those among us who are of that mind and can be happy, and he was happy.

THE COURT: Well, I don't smoke, I rarely drink and I have a fairly pleasant life.

MR. GLEASON: I do believe that, your Honor.

He seemed to have a niche in life and he seemed to be very happy, and he got along with his fellow men. And since (310) this dastardly act he has been doing something that we in trial law call eating yourself up. He has not been satisfied with himself. He has not been satisfied with anything that he has been doing at the time he has been doing it, and I don't think there is anything on earth, your Honor, that is more causative

of unhappiness than dissatisfaction. If a man is not satisfied--

THE COURT: Particularly with one's self.

MR. GLEASON: If a man is not satisfied with what he is doing, now if he's not satisfied with his general tenor of his life, the going to church on Sunday, the going home and having a game of cards, perhaps a baseball game--

THE COURT: Don't forget I'm not a jury.

MR. GLEASON: I'm sorry. In any event, your Honor, if a man is not leading a happy life and is condemned, according to both doctors, to a life of that kind for the rest of his life of dissatisfaction and of pain because it is testified here, and there is no reason for us to doubt, your Honor, that this gentleman is in pain and will be in pain for the rest of his life, and that pain is continuous and was caused by this trauma, and now, your Honor, I don't think that this gentleman--

(311) THE COURT: Who is sixty-three.

MR. GLEASON: What did you say his expectancy is? Well, we can get that very easily from the practice act, your Honor, but I think his expectancy of life is well over fifteen years and, as a practical matter, his body seems to be in good robust health, he must bear this head of pain for the rest of his life.

THE COURT: You're talking about expectancy irrespective of the accidentally caused condition.

MR. GLEASON: Yes. And I think four thousand

dollars that was paid to him is nowhere near compensation for what he has suffered and certainly is not for what he will be called upon to suffer for the rest of his life.

I would say, your Honor, that it is true, as counsel has said, that there must be the expenses of preparing the case, that must be met, and attorneys' fees--although I don't know what the attorneys' fees here are, but if I know Mr. Axtell I know he's not overcharging the man, but nevertheless these things must be taken care of, and what will be left to Mr. Thompson.

I think, your Honor, that a fair award here would be fifty thousand dollars, less the four thousand dollars that has been given to him. I think that would compensate him and not overcompensate (312) him for an injury which is real.

Now, your Honor, may I say this in closing--

THE COURT: Before you close, you're now talking about the Jones Act, or the unseaworthy count, maintenance and cure. You have also added, I think, Mr. Barron said he considered that relatively immaterial. Do both counsel now agree that the maintenance and cure may be eliminated for practical purposes?

MR. GLEASON: Yes, sir. And I'll say this: that Courts have spoken before on this and have said that if there is an adequate award that the compensation that is the maintenance and cure will be counted as being melded into that, your Honor.

THE COURT: I understand then upon plaintiff getting an

award you are willing to eliminate the maintenance and cure?

MR. GLEASON: Yes, sure.

Now, in closing may I just say one thing. I can be forensic, perhaps, and perhaps we lawyers should not be forensic, but one thing we can do and lawyers have done, that is, since the beginning of English law anyway, and that's looking back at the past experience to guide us. And that doesn't mean perhaps so much experience of the street as experience of our labors.

Now, your Honor, case after case has been tried on brain damage in all parts of (313) this country and it's not only in New York that high verdicts have come down in cases where real brain damage has been proven.

And there is a lot of difference, may I say, your Honor, between what you might call postconcussion syndrome, where there has been a little bit of shaking up of the brain, perhaps a few particles of blood have been allowed to remain on the dura or subdura and the patient finds he is dizzy for maybe a few months or maybe a few years--

THE COURT: Counsel, it's going to be utterly impossible, practically, for you to attempt to call my attention to a series of cases where judgments have been upheld in these cases, and that is why I suggested some time ago a memorandum.

MR. GLEASON: Well, sir, I didn't mean to make a list

of them but I do say this: that we do all know brain damage is looked upon and is considered, and we have it right from the stand, your Honor, from the doctor that testified that encephalopathy, brain damage, is looked upon seriously not only--

THE COURT: I have not tried negligence cases for twenty odd years without understanding that.

There is one of the men over there that has given me a lot of information on that.

MR. GLEASON: Yes, sir. Well, thank you, your Honor. That is why I say I think we lawyers can (314) take from experience more than other professions and more than other walks of life, and that is why I suggested, your Honor, that we give you voluntarily our ideas, because I think, your Honor, experience in both the field of negligence and everything else has rendered you in a position where you can give a fair award here. I mean, after all it is--I don't want to say--

THE COURT: That is the worst thing about trying a case without a jury. Go ahead.

MR. GLEASON: I don't think that words of counsel or written memoranda of counsel can do half as much for this Court as the Court's own experience. The Court has heard the case, has listened very carefully to it, and has had a world of experience, and now the Court finds itself in a position where it is the duty and its privilege to either find one way or

another, either for the plaintiff or defendant, and if he finds for the plaintiff, to make an award. And I think, your Honor, that your Honor is perfectly capable of doing that. Whatever it is it's going to be valued by counsel on both sides, I think.

THE COURT: Before we proceed.

(Discussion off the record between the Court and outside counsel.)

Now let's proceed with this case.

(315) MR. HANRAHAN: With complete sincerity, I think this is one of the most exaggerated cases I have ever seen with respect to damages. I think the four thousand dollars was completely adequate.

THE COURT: Counsel, I agree with you, that when a man has an anxiety complex little things are exaggerated.

Go ahead.

MR. HANRAHAN: The man makes two hundred and fifty dollars a month as second cook. He says he has worked on about a dozen ships since he got off and he has had a total period of disability of six months, so his personal damage loss of wages comes to fourteen hundred dollars, or thereabouts; fourteen or fifteen hundred dollars. He has had no medical expenses, they were all paid by the marine hospitals.

He has pain and suffering and is going to continue; but to what extent is this pain and suffering? Has it been incapacitating? We have been here three days and the

complaints are summed up as a desire to keep on the move, and that is the most ridiculous symptom for a seaman to complain about that I have ever run across. Why does a man go to sea for forty years if he is the type of fellow that wants to sit in a rocking chair? Certainly he wants to keep on the move all the time.

(316) He's got these complaints of headaches, but the doctors have testified he has had headaches before; syphilis of the brain and other things. So he has headaches.

THE COURT: The difficulty of your--

MR. HANRAHAN: Let me finish this, they have got the burden of proof here. I am the fellow that had--if you saw them come in here--one man from one steamship company after another all set to testify. Did they put one witness on the stand to sustain the burden of just how bad off this man is? Is there any evidence on his own anywhere in this case of what he is supposed to be suffering from, Mr. Thompson, himself? At the conclusion of the plaintiff's case I put the full, complete medical record in.

He's a man who has worked on dozens of ships. They didn't have any reports of an injury or illness. He passed examinations, sign-on examinations. All we had from him were several assertions that every time he went up to a doctor he would say, "I got a fractured skull a couple of years ago. I get headaches and dizziness and I'm fainting, but let me on this

ship, will you?" Are they going to let a man on a ship just because he assures them that despite those complaints he's going to do a good job? That is why they have (317) sign-on physical examinations. They don't want sick men on the ship, they want a man, a guy that's going to do his job, because he gets maintenance and cure whether the ship is at fault or not. If he were on the ship and got off that ship because of headaches and couldn't work and he is fainting, he needs all sorts of treatment, whether or not that accident happened five years ago on our ship or not. They took him on the ships, and he can hit them for maintenance. He never told them a thing. That is ridiculous.

Let's take the other complaints. He says, "Oh, I am disabled for several months. I go to the marine hospital over there several months and they get me out of the hospital, and the hospital says I'm fit for duty, in one month I go back to work."

And the next ship he is on he is on for six months. There's no complaint, no complaint. He gets off the ship and he goes to the Marine Hospital at Stapleton. Those records are there and he's out there for duodenal ulcer and chronic urethritis.

Then he goes back to work for the Hess Steamship Company and he puts in a couple of months with them and he gets off and is to the Baltimore Marine Hospital. For what?

Encephalopathy? No, undiagnosed disease of the kidney.

He goes back to work for some more ships. (318) He's not a dishwasher then, he's second cook, he's chief cook--and higher than he was on our ship.

He gets off a ship again in about two years after the accident and he goes into the marine hospital for an ulcer, for the prostate trouble, and trouble with his penis. Where is there any objective substantiation other than what Dr. Farr says?

Any guy that got a clout on the head the like of that and had these symptoms before, sure he's going to have headaches. But where is this man disabled?

It just so happens that the past couple of ships he's been on he's been on as a dishwasher. Doesn't your Honor know the condition of the Merchant Marine now? These guys have got to take what they can get. You have got men with a Master's license sailing as ordinary seamen on ships. And that is no exaggeration. I know that for a fact. Here is a former chief cook, he gets off, he came in here a month ago to try his case and he couldn't go out. We got a delay, if you recall, and that was after waiting for a year to come up here. He was busy working, he couldn't come up and appear for an examination before trial. And then he comes in here a month ago and is he bad off? Is he taking time for his head anywhere? I don't know about it.

He goes (319) over to Moore-McCormack Line, he wants a job, and they say, "We have got a dishwasher's job." Call it a dishwasher or a galley utility, it's just about one or two ranks lower than a crew mess man, and I imagine--this wasn't brought out--I believe this man is making more money as a galley utility man than he was as a crew mess man with the raises in wages unions have got. I have not had to prove that.

THE COURT: That is, therefore, no argument because whether he stayed a cook upward would have gone his wages.

MR. HANRAHAN: They have their burden of proof, of proving their side of this case. The fellow says, "My last job is galley man; I used to be a second cook." What is the difference in wages? How can your Honor speculate what the man has lost? I cannot come in here and prove the case for him. They didn't show any wage rates.

THE COURT: There was some evidence of wage rates, $248, or something like that.

MR. HANRAHAN: That is what he made when he was on our ship. Just for curiosity, I wish your Honor would ask him what he is making today.

MR. GLEASON: We can ask him what a chief cook makes and a second cook makes and get the difference.

(320) I know what the difference is; the difference is two hundred dollars a month.

MR. HANRAHAN: I say when we analyze special

damages this man has, the fact is there has been no evidence of anything other than headaches, and of course that is right up to the man. You ordinarily cannot tell when another person is experiencing a headache or not.

There is an old maxim that goes in the handling of these personal injury cases. If you've got a man who says he's hurt and doesn't work, you better pay him. I mean from the defendant's attorney's point of view particularly a seaman, because under the Jones Act it's very easy to prove negligence.

But when you've got a guy who says he's sick and he's working, working and going to hospitals, subjecting himself to trained physicians who could substantiate his complaints if he made them there, if a man is not going to make complaints in the hospital like he makes in the courtroom, I don't put much stock in them. I think he is very adequately--this is all I have to say--I think he is very adequately compensated with four thousand dollars that he received.

THE COURT: Thank you, gentlemen. I understand, then, that you're simply going to give me this McGraw citation and with that the case is closed?

(321) MR. HANRAHAN: Yes.

THE COURT: Thank you very much. I will let you hear from me just as soon as I possibly can. Are the x-rays in evidence?

MR. HANRAHAN: Yes, they are.

MR. AXTELL: I want you to look at the x-rays.

THE COURT: You close?

THE CLERK: They were marked with the whole hospital records.

MR. GLEASON: We thought it was all under one subpoena, the whole record was brought together.

THE COURT: You don't think I can read x-rays myself and understand them?

MR. AXTELL: I think so. If you want you can look at and read it right now. They show the place where he was hit.

THE COURT: I know where he was hit.

(Mr. Axtell passes x-rays to the Court.)

Yes, I can see where he was hit. It looks to me as though it was a little depressed; it looks to me as though the new callus bone--was depressed.

MR. HANRAHAN: I can't tell a thing about x-rays.

MR. AXTELL: Here is another that shows it more plainly. (Handing x-ray.) Here's another one. (322) The others are relative to different parts of the body.

MR.GLEASON: Inasmuch as they were with the hospital records, I think they can very well be part of the hospital records that were put in evidence.

MR. AXTELL: They were brought under the same subpoena and delivered. In our practice they always go together. Of course, I could ask that the case be opened for twenty

seconds and put them in.

THE COURT: Yes. I have heard no objection to their being marked in evidence. I have physically looked at them.

The case is closed.

MR. HANRAHAN: They are part of the record, I have no objection.

THE COURT: The case is closed.

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Plaintiff's Exhibit No. 2 - Hospital Records

(Excerpts from Records of Corpus Christi Marine Hospital - 1/16/50 to 2/10/50)

Was struck on head with meat cleaver.

Laceration scalp. X-ray of skull shows two linear fracture of skull with a small fracture of inner table-with no depression of fragments.

Improved: Transferred to Marine Hospital, New Orleans, La. at his request.

Part Head Hosp. No. 34115

X-Ray No. 13257 Att. Physician Dr. Russo

Steroscopic lateral and single PA and basal views of the skull show a fracture line near the middle of the right parietal bone. The fracture line is approximately 4 cms in length and is a straight line, widest in the middle, tapering sharply at both ends. Most of the fracture line is just thru the outer table but in the midportion it appears that the innnertable has also been fractured. This is a type of fracture caused by a sharp instrument such as a knife or an axe.
No depression of the fragments is noted.

J. R. RILEY, M.D.

(Excerpts from Records of New Orleans
Marine Hospital - 2/11/50 to 3/18/50)

Fracture simple of skull - rt parietal lane	Imp.
Lacerated wound of scalp	Imp.
Verruca plana skin darsum of penis	Imp.

Fulguration penile warts	3/1/50	3	Local procaine	No.

Plaintiff's Exhibit No. 2 - Hospital Records

(Excerpts from Records of Galveston Marine Hospital - 3/20/50 to 3/21/50)

Fracture, simple, parietal bone (right) (old) N. T.

History: Pt. states that he was hit over the rt. side of his head with a meat cleaver on Jan 13, 1950, while out at sea, by a mess boy, Mario Medina. Pt. caught this man in a homosexual act with another seaman and reported to the skipper. Medina hit him 3 times with a meat cleaver, 2 times on the rt. side of the head and once on the left shoulder as the pt. ducked. 2-1/2 days later the ship put in at Corpus Christi and the pt. went to the Memorial Hospital there. He was there 28-29 days and then was transferred to the Marine Hospital at New Orleans. He got out of this latter hospital on March 18 to proceed on his own to Corpus Christi to testify at an FBI trial against Medina. Pt. did not take the trip very well and by the time he reached Houston, he was forced to turned into this place for help. He was seen at St. Joseph's Hospital in Houston and then sent here by ambulance. An abstract from New Orleans states that the pt. had a linear fracture of his rt. parietal occipital region. Originally the pt. had lost the sensation in his rt. arm and leg but this gradually returned. He has had blurred vision from time to time since the accident, whenever the pain hits him. This is only with his rt. eye. Pain is less severe and occurs less often since he had a spinal tap in New Orleans. The pain is in the rt. parietal and occipital regions and is accompanied by bright flashes of light seen mostly with his rt. eye, and blurring of vision. Pain is extremely severe and makes the pt. want to kill himself occasionally. Pain is worse when he walks too much or reads too much and the pt. gets along pretty well when he stays quietly in bed. The rt. side of his head is tender. During these attacks, the pt. states he has bells in both ears and cannot from the rt. ear. He also becomes very nervous when the pain hits him and sometimes has shortness of breath during his attacks. There has been no disturbance of memory.

PE: Pulse 78; BP 124/84. Pt. appeared to be in chronic distress. There were several healed lacerations in the parieto-occipital region. There is tenderness to touch over the entire rt. side of the head above the face. Pupils were small and equal and reacted to light normally. Fundi showed mild to moderate arteriosclerotic changes. There was no papilledema. Remainder of the PE was ess. neg. including neurological exam.

Lab. work: Urinalysis was normal except for a trace of

(Galveston - continued)

albumin and a few cylindroids.

Hospital course: Pt. was afebrile during his hospital stay. He was discharged on March 21, in order to testify at the trial against Medina. He was discharged not fit for duty with a diagnosis of:

Simple fracture, right parietal bone.

Plaintiff's Exhibit No. 2 - Hospital Records

(Excerpts from Records of Galveston Marine Hospital - 3/25/50 to 4/1/50)

Diagnosis No.	Final Diagnosis ...	Cond. on Disp.
930-420.x(061)	Encephalopathy due to trauma (Headache)	Unimp.

Chief complaint: Pain in the head. Pt. was hospitalized previously from 3/20 - 3/21/50 with the same complaint and was discharged to attend a trial at the request of the FBI. The trial was postponed and the pt. has returned to stay here in the interim. The trouble all started when he was hit over the rt. side of the head with a meat cleaver on 1/13/50. He had a linear fracture of the rt. parieto-occipital region. Pain presently occurs mostly when the pt. walks or reads too much or is too active in any way. It is located in the rt. parietal and occipital regions and is accompanied by bright flashes of light seen mostly with the rt. eye. There is blurring of vision, "bells" in both ears, deepness and shortness of breath. For the past history and review of systems, you are referred to chart 37387.

PE: BP 126/82. Pt. is a colored male who appears chronically but not severely ill. Exam. of the head reveals a healed laceration in the rt. parietal occipital region with tenderness on touching the rt. side of the head above the face. Exam. of the eyes reveals that the pupils are small, equal, and react to light normally. Fundi show mild arteriosclerotic changes. There is no papilledama. There is mild scarring of the rt. left drum. Many teeth are missing. Neurological exam. reveals that reflexes are equal and physiologic. The Babinski is neg. Cranial nerves are intact. Sensation and motor power are normal. The remainder of the PE is noncontributory.

Lab. reports: 3/25/50, urinalysis neg. Kahn neg. 70 mm chest reveals that there is enlargement of the heart and no other unusal findings seen. On 3/30/50, visual fields were done on this pt. and they were thought to be of normal configuration.

Hospital course: This patient's course in the hospital was afebrile. EEG was done on 3/30/50 and was interpreted by Dr. Bruce of Galveston State Hospital, University of Texas, as normal EEG. This patient's condition did not change while he was in the hospital and he was discharged on 4/1/50 to outpatient status.

Final diagnosis: Encephalopathy, due to trauma, (headache)

(Excerpt from Records of Stapleton, Staten Island Marine Hospital - 4/9/50 to 4/28/50)

DISCHARGE SUMMARY

Patient is a 58 year old AS admitted on 4/9/50 with the chief complaint of peculiar painful sensations in the side of the head. Patient was also suffering from thrombophlebitis of a vein of the penis at that time. This latter condition responded rapidly and satisfactorily to local rest and application of an icebag.

During his hospitalization, patient was seen in consultation by the neuropsychiatric resident who felt that EEG's should be performed. This was done and interpreted as normal.

X-ray examination of the skull was negative although an abstract from previous hospitalization was reported as showing fracture of the skull. Patient gave a history of being hit on the head by a meat cleaver on 1/13/50.

Patient was observed here for some time for evidence of any intracranial damage and no such evidence was noted. Patient's chief complaint appeared to be discomfort superficially in the scalp in the region of his traumatic wound. Patient's scalp was shaved. A very small sinus tract was found and probed, and it was felt there might possibly be a residual suture present here.

Discharged: 4/28/50
Diagnosis: Encephalopathy due to trauma
Condition: Improved
Prognosis: Good
Disposition: 1 month convalescent leave recommended. Estimated fit for duty on 5/29/50.

Dr. J.C. Warnock/adm

Plaintiff's Exhibit No. 2 - Hospital Records

(Excerpt from Records of Stapleton, Staten Island Marine Hospital - 2/16/51 to 4/20/51)

DISCHARGE SUMMARY

This 59 year old colored male was well until about 4 months before admission when he began to have dull, persistent left upper quadrant pain and pain around his heart with palpitation and choking sensation. Patient stated he had been coughing severely in the past few days before admission; had diarrhea a few months before admission, but none at the present time. He also says that his stools were dark several days before coming to the hospital. Past history is significant in that he was struck on the right parietal region by a meat cleaver in January of 1950 and was said to have a skull fracture and treated at Marine Hospital in Texas. In 1937 a diagnosis of peptic ulcer was made at this hospital; in 1930 he was treated for syphilis at this facility.

Physical Examination: Revealed a well developed, well nourished colored male in no acute distress. Temperature 101; BP 128/90; pulse 88. Positive physical findings included well healed old scar of right parietal area; tenderness in both upper quadrants of the abdomen to palpation; all the deep tendon reflexes were hypo-active. There was an equivocal babinski bilaterally.

Laboratory and X-ray Data: Patient was fluoroscoped on admission. No evidence of cardiac or pulmonary disease. Routine urinalysis 3 to 5 white cells per HPF; Mazzini and Kahn negative. CBC 7,200 white cells; 60 neutrophils; 39 lymphocytes; 1 monocyte; 14-1/2 gms. hemoglobin; smears were negative for malarial parasites. NPN 115 mg.%; fasting blood sugar 120.

Hospital Course: Patient was placed on advanced sippy diet; antispasmodics; he was also placed on antibiotic therapy. Patient became afebrile after several days. However, his left upper quadrant pain persisted and patient was examined in the GU Clinic. Retrograde pyelography was done and a diagnosis of chronic urethritis was made. Pyelogram revealed the left kidney definitely larger than the right. Other x-ray studies including a chest film which was negative; routine skull plates also within normal limits. GI Series showed old chronic ulceration of the duodenal bulb with a mild antral gastritis. Barium enema showed no evidence of intrinsic disease of the lower bowel. IV pyelogram was done and this showed the inferior major calyx on the left to fail in filling in any of the films - suggested possible pathology in left kidney and an inflammatory action should be ruled out. Patient was followed in the GU Clinic by bladder irrigations and responded well to this treatment. A neuropsychiatric consultation was also obtained and it was recommended that the patient be given continued understanding and reassurance with particular emphasis on recent symptoms of kidney

(Stapleton, S.I. - continued)

pathology. Urine cultures showed staphylococcus aureus hemolyticus; E. Coli. With reassurance and the GU treatments plus the sippy regime, patient responded very well and was discharged on 4/20.

Discharged: 4/20/51
Diagnoses: 1. Duodenal ulcer
2. Urethritis, chronic
Condition: Improved
Prognosis: Good
Disposition: Fit for duty 5/21/51 Dr. H.S. Feldman/hq

Plaintiff's Exhibit No. 2 - Hospital records

(Excerpt from Records of Baltimore Marine Hospital - 6/11/51 to 7/1/51)

NARRATIVE SUMMARY

DIAGNOSIS: 710-Y00 Undiagnosed disease of the kidney.

HISTORY: This is a 59 year old Negro male AS admitted to the hospital 6/11/51 with chief complaint of sharp pain in the lower portion of his chest followed by burning on urination and hematuria. Patient's present illness started in April of this year when he noticed a sudden sharp pain in his chest region over his heart which radiated around to his left side and flank. It also radiated down to his groin and at times radiated down his upper extremity to his fingers. Sometime the radiation caused his finger to become quite stiff and seem to stick to each other. This was followed by burning on urination and gross hematuria. This hematuria was present 5 or 6 times at irregular intervals. He states that the passage of food seemed to be associated with pain in his left flank. Following this he noticed a white discharge from his penis. He also has had terminal dribbling for two months, nocturia 5-6 times, frequency 8-9 times during the day though stream is becoming smaller in size.

Past history and family history: non-contributory.

Review of systems: Patient had gonorrhea once, 1921; treated for syphilis, 1945; and alleges heart trouble, 1935. Treated for stomach ulcer in this hospital, 1947.

PHYSICAL EXAMINATION: We see a well developed, well-nourished colored male who seems to be quite apprehensive, does seem to be in some pain. There is less CVA tenderness and on palpation of the abdomen on the whole left side there is extreme tenderness although no masses or palpable organs can be felt. Rectal examination: prostate seems to be normal in size, shape, and consistency although he complains of some tenderness. Genitalia: negative. A small catheter was passed with ease and only about 1/2 oz. of clear urine was obtained. Two glass test showed shreds in the first glass; otherwise the urine was clear.

LABORATORY DATA: Urinalysis showed 10 to 20 white blood cells per high power field. Hematology and serology were within normal limits. A urine culture showed staph albus and C diphtheroids. BUN was 10 milligrams percent. Retrograde pyelograms revealed deformity in the middle calyx of the left kidney. An IVP pyelogram revealed approximately the same thing.

HOSPITAL COURSE: Because of some pain in the CVA region

(Baltimore - continued)

the patient was placed on hot Sitz's baths and they gave him some relief. After the IVP pyelogram the patient was urethroscoped and lateral lobe hypertrophy with 1-1/2 ounce residual was found. The cystoscopy revealed that it was impossible to pass catheters into the right ureter but Dr. Muelling was able to pass an F-4 into the left ureter. Therefore, the left retrograde was successful but the right one was not. The right retrograde reveals some deformity in the middle calyx of the left kidney. Post-cystoscopically the patient had some pain and difficulty but otherwise trouble. On 6/28/51 the patient was given a pass and he did not return. Therefore, on 7/1/51 he was discharged AWOL.

Plaintiff's Exhibit No. 2 - Hospital records

(Excerpt from Records of Stapleton, Staten Island Marine Hospital - 2/13/52 to 3/3/52)

TRANSFER NOTE

Admitted: 2/13/52 - Transferred: 3/3/52

This 59 year old colored AS was admitted with penile sore of 16 days' duration. He was told in South America that it was Syphilis without Dark field examination. Patient refused treatment until he got here. He had intercourse one week previously. History of treatment with malaria many years ago in 1920, also bismuth, salvarsan for three months. Serology since that time has been negative. Only told that "blood was bad". Patient also complained of painful urination, particularly on starting urinary stream associated with frequency of 7-10 times during the night and 6-7 times during the day. He also complained of a broken painful tooth which came on after chewing food ten days before admission. In addition, he complained of abdominal pain which has been intermittent for the past 1-1/2 years. He was hospitalized here from February to April, 1951 because of duodenal ulcer at which time he did okay on diet until November, 1951 when he was bothered considerably especially at night and in the morning confined mainly to the left lower quadrant, peri-umbilical, and epigastric regions, associated with occasional cramps and occasional continuous pain. No back pain and he had vomited only two times. He has considerable belching and bloating. Pain is relieved with milk, juices, and eggs. Pain on urination was not accompanied by blood, pus, or lithuria or back pain.

Physical examination revealed BP 140/92, deviated nasal septum to the left with partial left obstruction, loose right upper 1st incision apparently broken at the root, soft and slightly obese abdomen which was tender to palpation in the left lower quadrant, peri-umbilical, and epigastric areas associated with normal peristalsis and no rebound tenderness. No masses felt. Genitalia revealed a superficial, 1 mm. deep, clean ulcer at the corona 3-4 mm in diameter, non-indurated but tender and associated with several verruca acuminata close to the lesions.

Dark fields of the lesion were negative x 3. STS and battery tests were negative. Admission WBC was 3450 with 32 neutrophils, 58 lymphs; repeat on same day was normal with 7600 WBC's and normal differential. Urine was normal. Fasting blood sugars taken on patient due to frequency and questionable polyuria showed 154 mgms.% but a glucose tolerance test taken on patient was completely normal. Frei skin test was negative. Although Ducrey's skin test was positive, it was felt that ulceration was due to a tearing of an acuminata condylomata which patient claims he had. Had a site of ulceration. In addition, ulcer was healed within four days after admission.

(Stapleton, S.I. - continued)

Treatment consisted of sulfa therapy, dental treatment for the broken tooth, Bland diet and antacid regime regarding duodenal ulcer. On 2/26/52 patient had a cystoscopy, urethroscopy, and dilatation of urethra by the Urologist with 75 cc. residual urine; no disease of urethra, and the observation of lateral and median lobe enlargement. Tranburethral resection was thus advised. He is now being transferred for TUR, but it is to be noted that retrograde pyelography done in 1951 revealed left kidney larger than right and incomplete filling of inferior major calyx. Patient may need repeat retrograde pyelography. In addition, patient requested burning off of the condyloma acuminata on penis when having TUR.

Dr. Claude R. Garfield/adm

Plaintiff's Exhibit No. 2 - Hospital records

(Excerpt from Records of Baltimore Marine Hospital - 3/29/52 to 4/9/52)

NARRATIVE SUMMARY

DIAGNOSIS: 767-415.9 Postoperative status following transurethral resection of prostate.

HISTORY: This is a 60 year old colored male seaman who was admitted to the hospital on 3/29/52 with the chief complain of perineal pain. Patient had a transurethral resection for benign prostatic hypertrophy in the Staten Island Marine Hospital on 3/7/52. He alleged after this that he had bleeding for 17 days along with some dysuria. However his bleeding stopped and he was feeling much better. He was sent to New Orleans Public Health Service Hospital for a GI series and a followup of his duodenal ulcer. However, upon getting this far by train his pain and dysuria in the perineal region increased so much that he got off the train and came to this hospital. He also alleges that for the past 10 days his left testicle has been quite sore. He also noticed some bleeding urethrally on Saturday, March 29. The patient's past history reveals that he was cystoscoped at this hospital about a year ago, at which time it was decided that any operative work would be postponed because he got along so well post-cystoscopically. The patient alleges for 3 or 4 months he had no trouble, but then he started having increased frequency and nocturia. Therefore, he reported to the nearest Public Health Service Hospital for treatment. At the present time he has no trouble passing his water and is able to hold it for 3 or 4 hours. The remainder of the history is essentially negative. He states that he has been under treatment for duodenal ulcer for the past 3 years.

PHYSICAL EXAMINATION: Patient is a well developed, well nourished very apprehensive colored male in some acute distress. Most of his pain and tenderness is in the region of the perineum. Upon examining the urethra in the perineal region there is some thickening and tenderness of the urethra. Both testicles feel normal at this particular time. There are no other abnormalities. The rectal was not done.

LABORATORY DATA: On admission the serology was within normal limits. The White Blood Count showed 2,400. Urinalysis showed 30-40 RBC's per high power field and a rare cellular test.

HOSPITAL COURSE: Patient was placed on hot sitz baths t.i.d. and APC for symptomatic relief. He was also given penicillin and gantrinsin. On this regime he progressed rapidly. Medical consultation was sent in, however, the patient was not available so that was not seen. It is probable that he will need another checkup. Therefore, it was recommended that he return to Staten Island Marine Hospital for a checkup of his apparent duodenal ulcer. He was discharged on 4/9/52 fit for duty to return prn.

(Excerpt from Records of New Orleans
Marine Hospital - 11/13/53 to 12/15/52)

NARRATIVE SUMMARY

DIAGNOSES: Duodenal ulcer.
Schizophrenic reaction, chronic, undifferentiated type with pseudoneurotic conversion features.
Undiagnosed disease of liver.

HISTORY: This 60 year old, negro male, American seaman galley man was admitted to the hospital stating that he had been doing well until 1950 when he was struck on the head with a meat cleaver. He was treated here and discharged on 3/18/50 as being fit for duty in six weeks. Since that time he stated he has been able to work only half time. He presently suffers a hot burning pain in the head. This is located on the right side and occurs predominantly in the evening. He stated he has pain in the right eye all the time. He was treated in this hospital in 1949 for duodenal ulcer and he stated that during the month just prior to admission he has suffered a steady epigastric pain two hours before meals. He stated he occasionally has pain in the left lower abdomen which radiates posteriorly to the left side of the lumbar region and from there up to the left side of the neck posteriorly and down again. Occasionally his fingers stick together and he stated he has had five or six "falling out spells" since release from the hospital. The last episode occurred in January 1952. He stated he usually falls out on the street, and has jerking movements. The patient stated he had previously had electroencephalograms in April 1950 at USPHS Hospital, Galveston, Texas, and USPHS Hospital, Staten Island, New York. He stated he was told he showed "nothing wrong."

PHYSICAL EXAMINATION: Examination revealed a well developed, slightly obese, negro male who did not appear ill or in distress. He was outwardly quite anxious. Height was 72-1/4 inches, weight 204 pounds, temperature 97.2 degrees, pulse 53, and blood pressure 136/80. Examination of the heart and lungs showed no significant abnormalities. The liver was questionably palpable on abdominal examination. There was moderate left abdominal tenderness both in the upper and lower quadrants. There was hyperesthesia of the entire right side of the head, trunk, and right extremities. The remainder of the neurologic examination was within normal limits. Otherwise the complete physical examination was within normal limits.

LABORATORY DATA: Serologic tests for syphilis and urinalysis were negative. Hemogram revealed 14

(New Orleans - continued)

grams hemoglobin with 3,950 white blood count and a normal differential count except for 7 per cent eosinophils. Stool examination was negative on two occasions for blood, ova, and parasites. Spinal fluid examination showed 11 red blood cells per cubic millimeter, no increase in globulin, 60 milligrams per cent total protein, colloidal gold 1121100000, and Kahn negative. Heterophil antibodies were negative. Serum bilirubin was 0.13 milligrams per cent, cephalin flocculation 1 plus, and thymol turbidity 8.5 units. Bromsulfalein test on two occasions and initially showed 16 per cent retention of the dye in 45 minutes, and subsequently 20 per cent of the dye retained. Electrocardiogram was interpreted as being within normal limits. G.I. series showed a constantly deformed duodenal bulb presenting one area of which possibly represented a small ulcer crater. Fluoroscopic examination of the chest and esophagus was not remarkable. X-ray of the skull showed no significant abnormalities.

HOSPITAL COURSE: The patient was placed on a soft diet and given tincture of belladonna, phenobarbital, creamalin, and other symptomatic and supportive therapy. Gradually the abdominal complaints subsided but throughout the hospital course the patient continued to complain of pain in the back, abdomen, head with bizarre radiation from one portion of the body to another. He was seen in consultation with the Neuropsychiatric Service who concluded as follows: "Neurologic examination is entirely negative. Hypestnesia noted as vague, changing as to limits and disappears and is replaced with normal sensation with retesting and suggestion." The diagnosis of schizophrenic reaction was made. Chloral hydrate solution sedation was suggested and it was thought that "no therapy would be very beneficial except for immediate partial effect." The patient's symptoms gradually lessened. On 12/15/52 he was discharged as no further hospitalization was necessary. He was advised that he was fit for duty and it was suggested that he return to the Out-Patient Clinic of his choice whenever necessary. Medication given included instructions for soft diet, tincture of belladonna to take 25 drops three times daily, and creamalin to take 5 cc. as necessary.

Plaintiff's Exhibit No. 3 - Somberg report

HAROLD M. SOMBERG, M.D.
31 Lincoln Park
Newark 2, New Jersey

January 14, 1954

Silas Blake Axtell, Esq.
15 Moore Street,
New York 4, New York

Re: William Thompson

Dear Mr. Axtell:

At your request for a neurological consultation, the above captioned patient was examined by me in my office on January 5, 1954. In addition, I reviewed the photostatic copies of the hospital records of his various admissions to the United States Marine Hospitals in Baltimore, New Orleans and Staten Island. In addition I reviewed the hospital records of the Memorial Hospital in Corpus Christi, Texas.

This 63 year old male, who resides at 28 Hillside St., Newark, New Jersey, states that on January 13, 1950, he was employed on board the S.S. Rosina Marron. At this time he was struck in the right parietal region by a meat cleaver. He sustained two large lacerations of the scalp, together with a fracture of the right parietal area. He states that he was unconscious for twenty to thirty minutes after the accident. Finally, the ship reached port and on January 16, 1950, he was admitted to the Memorial Hospital in Corpus Christi, Texas. He remained in this institution until February 10, 1950. At this time he was treated for the persistent drainage in the scalp lacerations and he complained constantly of right-sided headaches. On February 11, 1950, he was admitted to the United States Public Health Service Hospital of New Orleans, La. In this hospital the fracture of the right parietal bone was verified and at this time it was noted that he still had some persistent drainage from the wound and that he had some right-sided weakness involving the arm and leg. In addition, there was some hypesthesia over the right side of the body. He was finally discharged on March 18, 1950, still complaining of headache, dizziness, and generalized irritability. The patient came North and on April 9, 1950, was admitted to the United States Marine Hospital in Staten Island, where he remained until April 28, 1950. At this time an electroencephalogram was done and while it failed to show any gross abnormality, it did indicate evidence of increased emotional tension. It should be noted that a lumbar puncture done at one of the hospitals showed an elevated protein and some globulin.

The patient states that in August, 1950, he returned to work, in spite

of the fact that he had episodes of pain in the right parietal region, which he describes as hot and cold flashes with radiation into the face, head and neck. These were intermittent in character and at one time were considered possible epileptic equivalents. On February 16, 1951 he was admitted to the Marine Hospital in Staten Island, at which time he remained until April 20, 1951. In addition to the cerebral manifestations, he had precordial pain and palpitation and urethritis. Complete examination at this time finally revealed evidence of an anxiety state with depression. He returned to work and managed to continue his activity, in spite of irritability, tenseness and persistent headache, until February 13, 1952, when he was readmitted to the Marine Hospital in Staten Island, at which time he had difficulty with urination. At this time a hypertrophied prostate was noticed and on March 7, 1952, a transurethral resection was done. He was discharged from the Marine Hospital on March 28, 1952, but was readmitted on the 29th and stayed until April 9, 1952, because of prostatic bleeding. He was seen in the Out-patient Department on November 12, 1952, at which time he complained of spells which occurred three times a week or so, which consisted of warmth and pain associated with tearing of the right side of the head and face. He was admitted to the New Orleans Marine Hospital on November 13, 1952, and remained there until December 15, 1952. Careful workup at this institution finally disclosed a tense individual with a chronic schizophrenic reaction and marked anxiety.

At the present time the patient continues to be depressed and listless. He states that he has lost considerable weight in the last few months. He describes his difficulty as a hot and cold water running down the side of his head. He claims exquisite tenderness along the course of the two scars in the right parietal region. He complains of constant pain in the head. The patient is right-handed but not aphasic.

The past history is significant in that he apparently had some sort of luetic infection in 1937, and was treated with fever and injections. In 1935 he had an episode which was suggestive of a myocardial infarct. He was admitted to the Marine Hospital in Staten Island on January 12, 1948, at which time he was studied for peptic ulcers. It should be noted that in November, 1947, he was studied at the Baltimore Marine Hospital, where a diagnosis of duodenal ulcer was made. In addition, the patient was admitted to the Marine Hospital on October 9, 1948, for low back pain with some left sciatic radiation. However, this has since cleared up.

On examination the patient appears tense, apprehensive, but is oriented as to time and place. He is a rather large, adult male, who shows some signs of recent weight-loss. He is oriented as to time and place. On general physical examination there is marked tenderness over the right parietal region. There is also some tenderness over the epigastrium. The remainder of the general physical examination is not

remarkable.

Neurological examination shows the cranial nerve functions to be intact. Smell is normal. The fundi are normal. The pupils are round, regular and equal, react promptly to light and convergence. There is no gross visual field defect. The extra ocular muscles are intact. The corneal reflexes are equal and active. There is no change in facial sensation. There is no facial asymmetry. The Weber test does not lateralize. Air conduction is greater than bone conduction, bilaterally. The pharyngeal reflexes are equal and active. The tongue protrudes in the midline.

Motor power is normal throughout. There is no atrophy or fibrillations. The deep tendon reflexes are equal and active, except for the left ankle jerk which is depressed. No pathological reflexes can be elicited. Sensory examination is intact to all modalities. Coordination tests are well performed.

It is quite obvious from examining this patient that he has a marked anxiety state, which almost borders on the schizophrenic pattern. I feel that in a large measure this is the result of the traumatic experience of January, 1950, in which he was attacked with a meat cleaver and sustained a fractured skull and two deep lacerations of the scalp. In addition, he undoubtedly sustained some organic disease of the brain, as manifested by the elevated protein and the presence of globulin in the spinal fluid several months after the injury. The periodicity of these attacks suggest the possibility of an epileptic equivalent.

Sincerely yours,

/s/ Harold M. Somberg

Harold M. Somberg, M.D.

(Excerpts from Records of Stapleton, S.I. Marine Hospital - 2/16/54 and 2/23/54)

Examination Requested

Routine skull

Tenderness over rt. parietal region since skull fx 4 yrs. ago. Has had drainage from scalp on several occasions since. Increasing tenderness & pain on chewing for last 9 months.

Radiographic report	Film No.	Date of Report
THOMPSON, WILLIAM	42032	2/16/54

ROUTINE SKULL FILMS: There appears to be some widening of the soft tissue shadows over the right parietal region. Unfortunately on the two AP projections the left sided soft tissues are obscured by artefact so that comparison cannot be made.

Otherwise there is no evidence of fracture or prolonged increased intercranial pressure. There is physiological calcification of the choroid.

DOCTOR'S PROGRESS NOTES

2/16/54 surg. Pt. has been having tenderness over the rt. parietal region since being hit there 4 yrs. ago by a meat cleaver. When he was hospitalized here several months after the injury a fx in that region was demonstrated. Also a small sinus tract was located where the scalp was shaped. It is felt that this might be due to a suture in the scalp.

About 1 yr. ago he again had some drainage from his scalp but has not had any since. In the last 9 months or so the tenderness in the rt. parietal region has increased & he has found that chewing tough foods hurts up in the . . . region.

On exam. he has marked tenderness over the parietal region. No definite defects in the skull can be felt, nor can any swollen . . . area be found. The pt. does have a thick matted Negroid type of hair which makes examination difficult.

Pt. has no other sx on kidney.

(Stapleton, S.I. - continued)

Diag: R.O. Osteomyelitis of skull.
Rx - Skull film
Return 1 week (2/23)
Phenobarbital grs. $\overline{ss}$ q.i.d.
APC's

Richie

2/23/54 X-rays reveal no evidence of bone destruction or fx. Tenderness seems to be located primarily at the site of the scalp scar. Scalp showed over the tender area & 10 cc. 1% . . . into it. Gave good relief of tenderness.

Rx Continue above medications
Ret. 1 week (3/2)
NFFD

Richie

UNITED STATES COAST GUARD

23 March 1953

Hanrahan and Brennan
Counsellors at Law
67 Wall Street
New York 5, New York

Re: S.S. ROSINA MARRON
Injury to William Thompson
January 13, 1950

Gentlemen:

This will acknowledge your letter of 11 March 1953 in which you state you represent Coastal Oil Company and the S.S. ROSINA MARRON in the defense of a law suit brought by William Thompson for personal injuries allegedly sustained on 13 January 1950, and request the employment record for Mr. Thompson, together with the names and addresses of his employers, for the past five years.

We are listing a record of employment for William Thompson, Z-116 599, for the period requested, as it is shown in his file.

VESSEL	OPERATOR	SIGNED ON	SIGNED OFF
SS SOUTH CAROLINA	The Texas Co. 135 E. 42nd St. New York, N. Y.	3/12/48	3/31/48
SS GEORGE MATTHEWS	Fribourg Steamship Co. 2 Broadway New York, N. Y.	4/3/48	5/20/48
SS CERRO GORDO	The Texas Co.	5/28/48	10/2/48
SS MARTIN BEHRMAN	Isbrandtsen Co. 26 Broadway New York, N.Y.	10/27/48	12/8/48
SS OBERLIN VICTORY	States Marine Corp. 90 Broad Street New York, N.Y.	2/9/49	4/4/49
USNT MISSION SAN JUAN	Tankers Co., Inc. 17 Battery Place New York, N.Y.	4/29/49	6/24/49
SS GULFHORN	Gulf Oil Corp. 17 Battery Place New York, N. Y.	7/18/49	8/21/49

SS GULFWELL	Gulf Oil Corp.	8/28/49	9/13/49
SS COALINGA HILLS	Sword Line 52 Wall St. New York, N.Y.	9/18/49	9/30/49
SS ROSINA MARRON	Sieling & Jarvis Corp. 74 Trinity Place New York, N.Y.	10/20/49	1/15/50
SS TORRANCE HILLS	The Texas Co.	7/21/50	12/21/50
SS WISCONSIN	The Texas Co.	12/22/50	1/28/51
SS HESS BUNKER	Hess, Inc. State St. Perth Amboy, N.J.	4/22/51	6/5/51
SS CHRISTIAN BERGH	Albatross Steamship Co. 120 Wall St. New York, N.Y.	6/25/51	9/2/51
SS FORT MIMS	California Tanker Co. California Oil Bldg. Barber, N.J.	9/17/51	1/23/52
SS SANTA INES	Grace Line 10 Hanover Square New York, N.Y.	1/26/52	2/6/52
SS SANTA CATALINA	Grace Line	8/28/52	9/17/52
SS GULF MARACAIBO	Gulf Oil Corp.	9/19/52	11/10/52
SS VIRGINIA	The Texas Co.	12/16/52	3/3/53

Coast Guard records are negative with respect to any disciplinary action against Mr. Thompson.

Very truly yours,

/s/ PGP

P.G. PRINS
Commander, U.S. Coast Guard
Chief, Merchant Vessel Personnel
Records and Welfare Section
By direction of the Commandant

 Defendant's Exhibit No. 1 - Coast Guard reports

UNITED STATES COAST GUARD

4 January 1954

Hanrahan & Brennan
Counsellors at Law
67 Wall Street
New York 5, New York

Re: SS ROSINA MARRON - Injury
to William Thompson - 1/13/50
Your File No. 43-H

Gentlemen:

This will acknowledge your letter of 9 December, 1953 in which you request a record of service for William Thompson subsequent to his signing off the SS VIRGINIA on 3 March, 1953, including the names and addresses of the operators of the vessels.

We are listing below the employment record of William Thompson, Z-116 599, as shown in his file as requested above:

Name of Vessels	Operators	Date of Employment
SS MARSHFIELD VICTORY	Orien Shipping & Trading Co., 80 Broad St. New York City	3/27/53 to 9/18/53
SS FRIBOURG TRADER	Fribourg Trading Corp. 2 Broadway, New York City	9/30/53 10/14/53

Very truly yours,

/s/ P.G. Prins

P. G. PRINS
Commander, U.S. Coast Guard
Chief, Merchant Vessel Personnel Records and Welfare Section
By direction of the Commandant.

Defendant's Exhibit No. 1 - Coast Guard reports

WESTERN

UNION

1954 Feb. 2 PM 5 31

HANRAHAN AND BRENNAN
67 WALL ST NYK

RETEL 2ND. FOLLOWING RECORD OF SERVICE FOR WILLIAM THOMPSON Z116599 SUBSEQUENT TO FRIBOURG TRADER ON 14 OCTOBER 1953. SS CLARKSVILLE VICTORY 11-2-53 TO 12-24-53. THOMPSON PRESENTLY EMPLOYED ON SS URUGUAY OPERATED BY MOORE MCCORMACK LINES 5 BROADWAY NEW YORK NEW YORK

U S COAST GUARD

Memorial Hospital
Corpus Christi, Texas
Feb. the first

Sieling-Jarvis

Dear Sir the Doctors think that the worst is over I'm still a little dizzy. I can set up in bed and walk to the bathroom and back. I'm thankful that I'm alive after what happened. I think I will be able to travel in six or 8 days time if I continue to improve like I'm doing now.

Will you kindly see about my transportation up to New York. Also will you let me no the whereabouts of the Rosina Marron.

Please if any mail at the office for me will you send them to this hospital for me. Hoping to hear from you soon. Thanking you very much.

From William Thompson
2nd Cook Rosina Marron.

Room 206. Bed 3. Memorial Hospital
Corpus Christi, Texas.

Defendant's Exhibit No. 2 - letters

February 6, 1950

Mr. William Thompson
c/o Memorial Hospital
Corpus Christi, Texas

Dear Sir:

We have for acknowledgement yours of February 1, 1950 and are most happy to hear that you are progressing satisfactorily and that you will be able to travel in the near future.

We have written our agents COLLIN & GISSEL, 502 Cotton Exchange Building, Houston, Texas and requested them to contact you with a view of rendering whatever assistance might be necessary.

We look forward to seeing you upon your arrival here in New York.

Very truly yours,

SIELING & JARVIS CORPORATION

By:
M. Mahoney, Accountant

MM:iw

Memorial Hospital
Corpus Christi Texas
Feb 9th

Sterling-Jarvis

Sir I got your letter this A.M. I did not hear from Collin-Tessel. The doctor here wants to send me to Galveston Marine Hospital. I told him I would rather go to New Orleans Marine Hospital. I would be near my family for they can come to see me twice daily. He said he can send me to Galveston free but New Orleans I will have to pay my own way. I told him I will so I'm leaving tomorrow Friday for New Orleans. My heart is still sore inside. It keeps me dizzy a lot. He said I will need to be in the hospital another three or four weeks. As soon as I'm well I will come to New York. I'm hoping to get my job back on the Rosina Marron. If any letters come for me please send them c/o Marine Hospital, New Orleans La.

Thanking you Very Much

From William Thompson

2nd Cook SS ROSINA MARRON

 Defendant's Exhibit No. 2 - letters

U.S. Marine Hospital
New Orleans La
Feb. 12th

Sieling - Jarvis

Dear sir I was just getting in the taxi at the hospital Friday morning about ten o'clock when the nurse came to the door and called me to come back and answer the phone. I did it was from Collin - Jessel in Corpus. They tell me to come to their office in the Wilson Bldg. They gave me $100 for transportation to New York. I already made my reservation on the Missouri Pacific Line to New Orleans. I went to them and ask them to take my ticket back. They refuse so I come on to this hospital. My sister and friends met me at the station and take me here. I did not go home I was feeling sick after the long ride. The doctors here told me I take a hell of a chance riding on a train with a fractured skull. Now I'm back in bed again. But I rather be here with my family than go to Galveston where they wants to transfer me.

I want to thank you for making arrangement for me. I will stay here till I'm well. Near my family will help to ease my mind and help me to get well faster. They can come to see me twice daily 2 to 4 - 7 to 8. I also can have my radio at my bedside. This much I can say I owed my life to Dr. Perkins - Dr. Russo and the good nurses in the Memorial Hospital.

I hope to make amend to them some day. Thanks again

from William Thompson

U.S. Marine Hospital
New Orleans La
Feb. 15th

Sieling - Jarvis

I'm glad to be here near my folks. They come to see me twice daily. I think I will be up and at him soon. That's how I feel right now.

Some wise guys from the Hall up in New York told some lawyer of my accident. Two of them was here to see me. They tells me a lot of trash. I listen till they were finish. I told them I'm a sick man. When I was well I work for Sieling-Jarvis and up till now they are very nice to me and I'm sure when I get well they will take care of me the best they can. If you two chissler don't get to hell out of here quick, I will call the doctor. Boy, you ought to see them scramble out. I laugh at them. My head has two compound fractures. I just no I will be up soon. I got my fingers cross. Please keep my job for me. Thank you.

from - William Thompson

Defendant's Exhibit No. 2 - letters

U.S. Marine Hospital
New Orleans La
Mar. 16th.

Sieling an Jarvis

Dear Sir I'm not too well. My head still doing tricksto me. One minute I'm down sick, my head pain very bad, then I feel a little better till the spell come on again. The trial come up Monday. I'm not well, but I'm taking a chance going to Corpus Christi to be at the trial. I almost die on the way over here. I will try and come to New York after the trial. Sir it may be two or three months before I will be able to go back to work. Please sir I like my job on the Rosina please keep it open that I can go back when I'm well.

I'm leaving here Saturday for Corpus. Hoping to be in New York soon. This come with my best respect.

William Thompson

Corpus Christi
Texas
April 5th.

Sieling-Jarvis

Dear Sir the trial is over. I'm glad of it it sure hurt me going from the hospital to Corpus and from Corpus to the hospital. They tried him Monday. He got 15 months on a mercy plea.

The Dr. tells me to rest here for a few days before travelling again. When I leave here I'm coming to New York Marine Hospital for a week or two. I can only travel one way thats sitting up. I can't lay down or lean back while riding it hurt my head.

I won't be able to work for a while the Dr. say I need lots of rest and quiet if I'm ever to get well. You don't no sir but I sure was hurt triple fractured. I never thought I would be alive to-day.

I will let you no when I arrive New York.

William Thompson

Royston Rayzor from 205 Cotton Exchange Bldg in Galveston was out to the Marine Hospital last friday to see me. He wanted to no if I need money or any help. I told him not right now for I was leaving the next day April the first to be in Corpus Christi on the 3rd for the trial.

Thanks for sending some one to see me I sure appreciate it.

William Thompson

Defendant's Exhibit No. 2 - letters

Marine Hospital
Staten Island
April 9th

Sieling-Jarvis Sir arrive New York at 6:35 this morning. The long ride make me sick. I come to the hospital at 9. They put me to bed.

My head is cutting up.

I come here from Corpus Christi after the trial. I'm in Ward 473 fourth floor.

William Thompson

Defendant's Exhibit No. 2 - letters

American Red Cross

Marine Hospital
Stapleton, N. Y.
April 13th

Sir

Please send some one from the office to see me. So many come to see me I told them I'm still sick and don't want to talk to any lawyer. Its three months now since I got hurt. So many different ones come to try an get me to talk to them. I won't talk to or see any one till I seen some one from Sieling-Jarvis.

I got here Sunday from Corpus Christi.

Please let me hear from you soon so I can no what to do. Lots of guys telling me different tales. I don't listen to them.

from William Thompson

Defendant's Exhibit No. 5 - Release

Quintuplicate

RELEASE OF ALL RIGHTS

READ CAREFULLY. By signing this you give up EVERY right you have.

I, /s/ William Thompson Age 58 Married

Address 1913 Feliciana St New Orleans La in exchange for the sum of

Four thousand ($4000.) less the sum of Five hundred fifty ($550) which has been previously paid to me . . . . . DOLLARS ($4000)

which I have received, do hereby Release and forever discharge
(Write the word "release" to show that you know what you are doing)
Coastal Oil Company Owners and Seiling and Jarvis Managing Operators

their heirs, executors, administrators, successors and assigns and

their several vessels and in particular the

ROSINA MARRON

and the owners, agents, charterers, masters, officers and crews of said vessels from each and every right or claim which I now have, or may hereafter have on account of injuries or illness suffered by me as follows: injuries alleged to have been sustained by me and/or illness alleged to have been incurred and/or contracted by me while I was in the service of said steamship ROSINA MARRON on or about January 13, 1950 and/or at any other time or times

and, in addition to that, I Release them from each and every right
(Write the word "release" to show you know what you are doing)
or claim which I now have or may hereafter have because of any matter or thing which happened before the signing of this paper, it being my intention by the signing of this paper to wipe the slate clean as between myself and the parties released, even as respects injuries, illnesses, rights and claims not mentioned herein or not known to me.

READ THE FOLLOWING SIX NUMBERED STATEMENTS CAREFULLY

(1) I know that this paper is much more than a receipt. IT IS A RELEASE. I AM GIVING UP EVERY RIGHT I HAVE.

(2) In making up my mind to sign this release I am using my own judgment without regard to anything that has been told me by anybody.

(3) I know that in signing this release, I am among other things, now settling in full for all injuries, illnesses and disabilities which I

have had already, which I have now, and which I may have in the future, either because of the particular occurrence mentioned above or because of any other occurrence in the past, or because of both, even though I do not know that I have had already, have now or may have in the future such injuries, illnesses and disabilities, and even though they are not mentioned particularly in this release; and I do all this regardless of what anyone may have told me about my injuries, illnesses and disabilities or about anything else.

(4) Regardless of what anyone may have told me, I realize also that my injuries and illnesses and disabilities may have been, may be, or may turn out to be worse than they seem to be now. I am now settling for that too.

(5) I am signing this release because I am getting the money. I have not been promised anything else.

(6) I am satisfield.

THE FOLLOWING IS TO BE FILLED IN BY THE CLAIMANT HIMSELF IN HIS OWN HANDWRITING

A. Do you make the above six numbered statements and do you intend that the parties whom you are releasing shall rely on the statements as the truth? A. yes

B. Have you read this paper from beginning to end?

A. yes

C. Has this paper been read to you? A. yes

D. Do you know what this paper is which you are signing?

A. yes

E. What is this paper which you are signing?

A. Release of Everything
(Write here "release of everything")

F. Do you know that signing this paper settles and ends EVERY right or claim you have for DAMAGES as well as for past and future MAINTENANCE, cure, and wages? A. yes

Defendant's Exhibit No. 5 - Release

THEREFORE, I am signing my name near the seal to show that I mean everything that is said on this paper.

Dated June 2nd , 19 50

(*) T H I S I S A R E L E A S E (SEAL)

Claimant, if he wishes to sign, should write his name upon the words "THIS IS A RELEASE" immediately above.

(*) The signature "William Thompson" was written in this space.

(Certificate of Witnesses)

(Jurat)

No. [redacted] 1955

Office - Supreme Court, U. S.
FILED
MAY 28 1955
HAROLD B. WILLEY, Clerk

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 11,315

WILLIAM THOMPSON,

Plaintiff-Appellee

vs.

COASTAL OIL COMPANY,

Defendant-Appellant

BRIEF and APPENDIX for APPELLEE

SILAS B. AXTELL,

Attorney for Plaintiff-Appellee,

15 Moore Street,

New York, New York.

MARTIN G. STEIN,

JOHN A. GLEASON,

Of Counsel.

RECEIVED & FILED
SEP 28 1955
IDA O. CHESKOFF
Clerk

Earl A. Borrows, P. O. Box 651, Newark, N. J.

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COUNTER STATEMENT OF QUESTIONS INVOLVED

1. Whether the employment of a homosexual whose tendencies lead him to attempt murder renders a ship unseaworthy.

2. Whether the failure of the master of a vessel or the owners thereof to rid it of a homosexual after notice of his tendencies constitutes actionable negligence.

3. Whether the failure of the master of a vessel to take reasonable precautions to see to the safety of the crew after being informed of a homosexual act by one of the crew members constitutes actionable negligence.

4. Whether a deliberate and premeditated assault with intent to murder by one crew member on another renders said ship an unsafe place to work.

5. Whether a release, signed by a seaman who had no counsel, no independent medical advices, and was not aware of the seriousness of his injury, is a bar to recovery.

COUNTER STATEMENT OF THE CASE

William Thompson, the Plaintiff-Appellee, hereinafter referred to as Thompson is a 62 year old seaman who has spent all of his adult life or about 40 years in the service of the U. S. Merchant Marine. This service has been mainly duty in the Steward's Department of the dozens of vessels upon which he has served (dep. of Thompson).

On or about October 20, 1949, Thomoson obtained a berth aboard the "Rosina Marron" as a second cook. This vessel, a tanker, was owned, operated and controlled by the Coastal Oil Company, the Defendant-Appellant and carried a crew of about forty men. The department that Thompson worked in, the Steward's Department, was made up of eight men, including and under the supervision of the chief steward, Mathias Schiffers(Appellee's p. 42a).

Thompson was a good worker and well liked by the rest of the crew. The trial court describes Thompson as

> ". . . a big, clean-cut masculine individual, who neither smoked nor drank" (Appellant's p. 14a).

Another member of the Steward's Department was a crew messman by the name of Mario Medina. Among his duties was to serve meals to the members of the crew. Medina, according to the testimony of other crew members taken by deposition, was described as being "queer", "effeminate", and "not normal." The chief steward called him "Rosina", and in fact he was known to the Captain as "Rosina", to the Chief Engineer as "Gloria", and to various other

members of the crew as "Sadie", and "Susie" (Appellee's p. 5a). He spoke with a high-pitched voice (Appellee's p. 26a), kept perfumes and lotions in his foot locker (Appellee's p. 34a), moved his hips and hands like a woman and at times had been seen kissing other members of the crew on the lips while he served them their meals (Appellee's pp. 43a-46a).

He had served on the vessel under the same officers for at least two voyages (Appellant's p. 43a) and these homosexual characteristics were well-known to all the licensed and unlicensed personnel on the vessel (Appellee's p. 48a).

On the evening of January 12, 1950, Thompson, wishing to play a game of cards, went to the room occupied by Schopf and Pittaway, members of the Deck Department. The door to this room was closed but not locked. Upon opening the door, Thompson found Medina in a bunk with two other crew members engaged in a homosexual act (Appellant's p. 75a). Thompson, repelled at the sight before him, reported, as any decent and normal individual would, this incident to his superior, Chief Steward Mathias Schiffers, with the request that the Chief Steward should in turn report this incident to the Captain (Appellee's pp. 50a-52a; Appellant's p. 79a).

In so reporting this degenerate act, Thompson felt he was fulfilling his obligation as a crew member, and to his vessel. The Chief Steward did report this incident to the Captain that very morning (Appellee's pp. 52a, 53a). Surprisingly enough, the Captain informed him that Medina had already reported to him, and that he, the

Captain, would take care of it (Appellee's p. 53a). All of this took place on the morning of January 13, 1950 (Appellee's p. 52a).

Thompson also reported what he witnessed to Matthew Caplis, Union Delegate of the Steward's Department (Appellee's p 19a).

On the evening of January 13, 1950, some twelve hours after the Chief Steward; Steward's Delegate; and Captain were informed of the incident, a special union meeting was called (Appellee's pp. 13a, 19a). This was attended by the delegates of the Steward's, Engine and Deck Departments, and also by Medina, and the two men accused of engaging in this unnatural sex act with him, Schopf and Pittaway (Appellee's p. 56a). The purpose of the meeting was to confront Medina with the charges made against him by Thompson (Appellant's 15a). During the course of the meeting, Medina denied the charges made against him by Thompson, refused to leave the ship, and left the room before the meeting ended (Appellant's pp. 15a, 16a). In retrospect it can be seen that he did this with the premeditated plan of killing Thompson. He went down to the chief cook's room, stole the keys for the galley (Appellee's p. 58a), unlocked it and took down the meat cleaver. This he hid under his shirt, went upstairs to the boat deck, and waited in the darkness where he knew Thompson must pass in returning from the meeting to his quarters (Appellee's p. 57a). A short time later the meeting broke up and the participants, including Thompson, walked in single file past the doorway where Medina lurked in the dark. He allowed the two crew members who preceded Thompson to walk by and then viciously and murderously struck Thompson three hard blows on

the head with the sharp edged cleaver and said, "I got you, you son of a bitch" (Appellee's p. 25a).

It was only then, after Medina's attempted murder of Thompson that the Captain placed Medina in irons (Appellee's p. 29a).

Thompson, as a result of this murderous and unprovoked assault, sustained multiple fractures of both tables of his skull, and severe, and permanent brain injury (Appellant's pp. 16a, 17a, 26a).

Medina was subsequently brought to trial in the District Court of the Southern District of Texas at Corpus Christi and was convicted of assault with intent to murder (Appellant's p. 16a).

Thompson was removed from the ship on January 1, 1950 and taken by ambulance to the Marine Hospital in Corpus Christi, Texas, where he remained until February 10, 1950. The medical record of that facility states (Appellant's p. 314a) among other things:

> "Most of the fracture line is just thru the outer table but in the mid-portion it appears that the inner table has also been fractured."

From Corpus Christi, Thompson was transferred to the New Orleans Marine Hospital on February 10, 1950, where he remained until March 18, 1950 (Appellant's p. 315a). He was also hospitalized due to the aforementioned assault at the following hospitals (Appellant's pp. 316a-319a; 327a; 332a):

Name of Marine Hospital	Dates of Entry and Departure
Galveston, Texas	March 20, 1950 to March 21, 1950
Galveston, Texas	March 25, 1950 to April 1, 1950
Stapleton, Staten Island	April 9, 1950 to April 28, 1950

New Orleans, Louisiana November 13, 1952 to December 15, 1952

Stapleton, Staten Island February 16, 1954 to February 23, 1954.

The second and third hospitals listed above, diagnose Thompson's complaints as "Encephalopathy due to trauma" (Appellant's pp. 318a, 319a.) This is defined in medical dictionaries as "disease of the brain caused by wound or injuries."

Although Thompson has worked on a number of ships since the assault, he still experiences pain and burning sensations in his head and this pain incapacitates him from time to time (Appellant's p. 26a). Examination by Dr. Somberg, neurologist of Newark, New Jersey, on January 14, 1954 revealed an organic disease of the brain with the possibility of an epileptic equivalent as well as a marked anxiety state, all the result of the assault on January 13, 1950 (Appellant's pp. 329a-331a).

While Thompson was confined to the Marine Hospital in Texas and New Orleans he wrote about eight letters to the shipowner. All of these contain complaints of the pain and suffering he was then enduring (Appellant's pp. 338a-346a).

The trial court describes the events leading up to the signing of the release by Thompson for $4,000 as follows (Appellant's pp. 17a-19a):

> "Meanwhile, shortly after his first discharge from Stapleton, April 28, 1950, he went to one Barron, of Ship Owners Claim Bureau, representing defendant, to get settlement moneys on his case, having refused the importunities of a series of lawyers who sought to represent him. Meanwhile, Barron, or another agent of the defendant, had had Thompson examined by their Dr. Farr, who reported that Thompson then, in May 1950, would be able to return to work in three months, and had but a 10% permanent disability. This was in fact somewhat similar to the prognosis then made by the hospital itself, which was for 'good' recovery, and

that he would be fit for duty May 29th. But that both Dr. Farr and the hospital were incorrect in their prognosis as to the length and amount of Thompson's mental and neuropsychiatric disability appears quite clear. For instance, not three months, but a year later, we find him again confined in the Stapleton Hospital, where, among the treatment of other disconnected conditions, we find he had a 'neuropsychiatric consultation', and a year after that, at the New Orleans Hospital, he was diagnosed, among other conditions, as having 'schizophrenic reaction'. Finally, now, three and one-half years after Dr. Farr's examination, Thompson is still receiving out-patient treatment at the Stapleton Marine Hospital, where they recently gave him a head x-ray, obviously in order to ascertain any objective basis for his neuropsychiatric complaints. While the x-ray was negative, Dr. Farr himself admits these complaints are real, not sham. Furthermore, the undisputed testimony shows that Thompson can not serve in his old position as cook, since the heat of the stove so seriously affects the pains in his head, and that he now is acting as utility or mess man. Not only is this a job of lower rating than cook, but it of course carries substantially lower pay.

"In any event, at Thompson's settlement conferences with Barron, the latter, or defendant's other agent, told Thompson of this prognosis of Dr. Farr, now found to be incorrect, and Barron refused to consider any greater settlement figure than $4,000.00 because he insisted to Thompson that Thompson was practically well then. Barron admits that if he had then known that Dr. Farr's prognosis was incorrect and that Thompson's future would be as serious as it has now turned out to be, he would not have evaluated his case at $4,000.00, but would have told Thompson to get a lawyer before he settled. Barron also told Thompson he thought he had a weak case on liability. For at that time the case of Keen v. Overseas Tankship Corp., (2 Cir. 1952) 194 F.2d 515, Cert. den. 343 U.S. 966, had not been decided, and Barron thought that notice to defendant of Medina's alleged vicious character, a difficult thing to prove, was essential, in order to impose liability on the owner of the ship. But it is clear that this is not the law, and that a seaman can recover if hurt by unseaworthy personnel, in the same way that he can if he is hurt by unseaworthy material, and quite regardless of the

ship owner's notice or negligence.

> "Thus, as a result of these incorrect, though not intentionally false, statements of both fact, and law to Thompson, this man, unrepresented by counsel, and without any independent medical advices of his own, signed a full release of his right for the sum of $4,000.00. Such are the facts in outline."

To bring this case up to date, Thompson is still receiving out-patient treatment as a result of the assault and as Dr. Somberg stated in the last paragraph of his report January 14, 1954 (Appellant's pp. 329a-331a) (Plaintiff's Exhibit No. 3):

> "It's quite obvious from examining this patient that he has a marked anxiety state, which almost borders on the schizophrenic pattern. I feel that in a large measure this is the result of the traumatic experience of January, 1950, in which he was attacked with a meat cleaver and sustained a fractured skull and two deep lacerations of the scalp. In addition, he undoubtedly sustained some organic disease of the brain, as manifested by the elevated proteins and the preserve of globulin in the spinal fluid several months after the injury. The periodicity of these attacks suggest the possibility of an epileptic equivalent."

ARGUMENT

POINT I

THE ACTIONS, CONDUCT AND BEHAVIOR OF MEDINA PRIOR TO THE ASSAULT IN ISSUE CREATED A SITUATION ABOARD THE VESSEL FRAUGHT WITH GRAVE PERIL TO ITS PERSONNEL.

It is perfectly clear from a reading of the record that Medina was not equal in disposition to the ordinary seaman in the calling. The testimony of the three crew members of the S.S. "Rosina Marron", Caplis, Schopf and Schiffers, taken by deposition, clearly demonstrate this.

The testimony of Caplis and Schiffers is also quite explicit on the type of person that Medina was known to be by the rest of the crew and officers, by virtue of his actions and behavior.

The defendant, in his brief (p. 2) emphasizes that Medina's

> ". . . record was barren of any evidence of misconduct, viciousness or violence."

The record eloquently disproves this. Several examples of grave misconduct are recited by Schiffers, the Chief Steward, who testified that he saw Medina

> ". . . kissing two members of the crew right on the table about two months prior to the assault."
> (Appellee's pp. 43a, 45a)

Schiffers also testified that Pittaway

> ". . . was his regular girl friend . . ."
> (Appellee's p. 47a)

Furthermore Medina did evince vicious tendencies.

Caplis, his room mate, also the union delegate of the Steward's Department testified that:

> ". . . Previous to this assault, Medina had told me that he was going to kill Thompson." (Appellee's p. 31a)

and also:

> "He was going to kill that 'son of a bitch'; that's what it was." (Appellee's p. 32a)

Medina's viciousness in the assault itself is vividly described by the trial court as follows:

> ". . . concealed himself in a dark door way by which he knew Thompson would shortly pass, and then, with the cry, 'I'm going to kill you', struck the owner of those lips [Thompson] in the head, not once, but thrice, with this heavy meat cleaver." (Appellant's pp. 21a, 22a)

Immediately after the assault took place, Medina is quoted by Caplis as saying:

> "I can't give it exactly, but it was to the effect that 'I got you, you son of a bitch' . . . " (Appellee's p. 25a)

In addition it is submitted that the situation aboard the ROSINA MARRON calls for serious inspection and further that the conditions on the vessel as testified to not only constituted an abhorrent nuicance but a grave peril to the normal seamen aboard the vessel. In this regard we call the Court's attention to the well-known fact that when sexual abnormality is discovered in the Armed Service the individual evidencing it is quickly weeded out and discharged. In our jails such individuals are segregated from the other inmates. The reason for this is certainly not the natural abhorrence the normal man has

for homosexuals but rather the knowledge on the part of those in charge that these people spell trouble and danger for normal men who must live with them. This may be illustrated as follows:

A man who associates with murderers imperils himself continuously, and if he witnesses a murder his own life may well be the penalty, for murderers abhor witnesses. Quite equally those forced to remain in the company of homosexuals and their paramours may well become victims of their revenge if perchance they are witnesses to the abnormal acts of these people, for Medina's own acts following detection show they will maim or kill to avoid exposure.

Such was the picture aboard the ROSINA MARRON. The trial court hypothetically asks in the first sentence of his opinion:

> "Does a pot-pourri of homosexuality and attempted murder create an unseaworthy ship?" (Appellant's p. 14a)

He found it did.

We submit further that in allowing Medina and his "girl friends" to stay on the vessel after discovering them kissing one another openly on the lips, the vessel's officers were guilty of negligence. We submit further that these officers were again guilty of negligence in allowing Medina to remain at large after Thompson had discovered and reported the incident in the forecastle. Furthermore, this negligence was the proximate and direct cause of Thompson's injuries. Surely the sight of a man kissing other men openly on the lips (Appellee's p. 45a) is sufficient notice that conditions were terribly wrong aboard the vessel and called for immediate action. Surely upon the discovery of the

abhorrent act of homosexuality, it was evident to the ship's officers that drastic and immediate steps should be taken to protect Thompson and other members of the crew. And yet we find here a bland acceptance by the officers of Medina's aberrated tendencies and indeed rather fond if joking allusions to him as "Rosina", "Susie" and other feminine names. Thompson, finding himself in this unwelcome situation, inadvertently discovers three crew members in as filthy and abhorrent an act as can be conjured by the human mind. His duty is plain. He must report it.

Schopf, who was in the room at the time and whom Thompson thought, perhaps mistakenly, was one of the three participants, said to Thompson "I'm glad you came down" (Deposition of Schopf p. 8; Appellant's p. 15a), which is understandable, for Schopf knew of the existence of the ugly cancer on the vessel and he wanted it out, whether he was a participant or not, and he knew Thompson was man enough to stand up to his duty and put a stop to this filthy evil. This Thompson did, and for his loyalty to the vessel, its owners and his fellow crewmen he very nearly paid his life and now harbors within his mind a neurology which will be ever with him and will never let him rest (Appellant's p. 26a).

This was not a brawl among drunken seamen. Nor was it an outgrowth of animosity between two gentlemen of color, as our adversay would have us believe (Appellant's Brief p. 2). Thompson was injured in the service of the ship as surely as if he had been shot quelling a mutiny. A mutiny, it was in effect, against the best cherished ideals

of the human race and the seeds of this mutiny had been discovered by the officers of the vessel weeks and months before its outbreak and instead of rooting it out they condoned and considered it a joke. Thompson was a victim, not of an "accident" but of a condition aboard the vessel as dangerous as a cholera, which must inevitably reach out its filthy hands and take a victim.

POINT II

THE EMPLOYMENT OF A SEAMAN WITH HOMOSEXUAL TENDENCIES, LEADING HIM TO ATTEMPT MURDER, CREATES AN UNSEAWORTHY SHIP.

In 1903 the United States Supreme Court decided The Ocseola, 189 U.S. 158, 175, which held among other things:

> "That the vessel and her owner are both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

This remedy has not only become firmly entrenched in the Admiralty Courts of this country but has been extended to longshoremen and ship repair workers.

The shipowner cannot escape liability for injuries received as a result of the vessel's unseaworthiness even if he did not know and in fact could not have known, of the defects in the ship that rendered it unseaworthy.

Seas Shipping Co. v. Sieracki, 328 U.S. 85, (1946), Hawn v. Pope & Talbot Inc., 198 F.2d 800 (3d Cir. 1952) aff. 346 U.S. 406.

This obligation on the part of the shipowner also extends to a duty to provide a competent crew. The shipowner's obligation to provide a seaworthy crew has been the law for many years.

See: Pacific Mail S.S. Co., 130 Fed. 76 (9th Cir.), Cert. Denied 195 U.S. 632 (1904), where a heavy loss of life occurred as a result of a language barrier between the Caucasian officers and the Oriental sailors under their command.

In the case of The State of Maryland, 85 F.2d 944, 946 (4th Cir. 1936) the Court states:

> ". . . and the same principle which imposes the duty of furnishing safe and suitable appliances imposes also the duty to warn and instruct i.e., the duty of taking all reasonable precaution that the employee shall be free of unnecessary dangers in the performance of his duties. . . And there is an even stronger reason for applying the doctrine in the maritime law, where because the seaman has not the privilege of quitting the service or exercising his own judgment, the owners should be held to the strictest rule of diligence and care."

In The Rolph, 299 Fed. 52, 54 (9th Cir.), Cert. Denied 266 U.S. 614 (1924) the Court states:

> ". . . the basic thought is that the vessel shall be equipped to perform the duty which she owes to the human beings on board her . . ."

Despite what the appellant states, the Court of Appeals (2d Cir.), did more than send Keen v. Overseas Tankship Corp., 194 F.2d 515, 518 (2d Cir.), Cert. Denied 343 U.S. 966 (1952) back for a new trial. That learned Court enunciated in no uncertain terms that a shipowner's warranty of seaworthiness includes his seamen as well as the ship and its appurtenances. The opinion by Learned Hand, Ch. J., in regard to

the issue of seaworthiness and competency of ship's personnel reads as follows:

> "We can see no reason for saying that, although the owner is liable if the ship's plates are started without his knowledge, he is not liable if he signs on a homicidal paranoic whose appearance does not betray his disposition . . . The warranty of seaworthiness as to hull and gear has never meant that the ship shall withstand every violence of wind and weather; all it means is that she be reasonably fit for the voyage in question. Applied to a seaman, such a warranty is, not that the seaman is competent to meet all contingencies; but that he is equal in disposition and seamanship to the ordinary men in the calling . . We can see no antecedent reason to assume that after the owner has used due care in selecting the crew, they will in many instances turn out not to be up to the ordinary measure of the calling."

Therefore, despite appellant's argument that the Keen case is an unreliable and unworkable means of determining whether a ship is unseaworthy, we can clearly see that the Court took great pains to point out an absolute test, namely whether the crew member

> ". . . is equal in disposition and seamanship to the ordinary men in the calling." (Ibid.)

In Jones v. Lykes Bros. Steamship Co., Inc., 108 F. Supp. 323 (S.D.N.Y.) (1952), rev'd. 204 F.2d 815, 817 (2d Cir.), Cert. Denied 346 U.S. 857 (1953); the Court of Appeals in reversing judgment in favor of the plaintiff stated:

> "We are not satisfied that the findings proved that Hunter was a man unfit to serve, judged by the usual standards of the calling."

However, the Court did uphold the doctrine it laid down a year before in the Keen case in the following language:

> "The warranty is indeed unconditional, as is the warranty of the ship herself and her gear; but it means,

> as we said, not that a 'seaman is competent to meet all contingencies'; but that he is equal in disposition and seamanship to the ordinary men in the calling."

The above language is indicative that the standards laid down by the Court in the Keen case are reliable and workable.

Although the Court of Appeals in the Fifth Circuit in Lykes Bros. S.S. Co. v. Boudoin, 112 F. Supp. 177 (D.C. La. 1953); rev'd 211 F.2d 618 (5th Cir., 1954), found it impossible to reconcile the Jones case and the Keen case; the trial court in the case at bar aptly does this as follows:

> "But fisticuffs differ as widely as the sea itself from a planned murder with a meat cleaver." (Appellant's p. 22a)

The standard or rule laid down in the Keen case and properly followed in this case is simply that the owner of the ship warrants that each member of the crew

> ". . . is equal in disposition and seamanship to the ordinary men in the calling."

It is respectfully submitted that the learned Court of Appeals (5th Cir.) has failed to distinguish between the Jones case and its predecessor, the Keen case in reversing Boudoin v. Lykes Bros. S.S. Co. (supra).

On the basis of the above, the appellant, in urging this Court to disregard the Keen case in favor of the Boudoin case, has itself failed to distinguish between the facts in the Boudoin case and the case at bar. The distinctions are:

(a) The assault in the Boudoin case arose when the assailant

was caught attempting to steal a bottle of brandy, a crime that can not be classified as vicious, while in the case at bar the trial court's finding was:

> "No more vicious crime can well be imagined." (Appellant's p. 22a)

(b) There was no finding by the Court of Appeals in the Boudoin case that the assault was deliberate or premeditated and indeed the facts bespeak otherwise. However, the trial court in the case at bar classified Medina's plan to murder Thompson as follows:

> "Nor was it one executed on the spur of the moment, but by plan and premeditation." (Appellant's p. 22a)

Therefore, it is respectfully submitted that the standard set down in the Keen case is workable.

As applied to this case, this standard clearly demonstrates that the appellant failed to provide Thompson with a seaworthy ship, or, as the trial court states:

> ". . . none but a man of truly vicious propensities would have attempted to murder the one making such a charge, whether true or untrue." (Appellant's p. 22a)

POINT III

DEFENDANT WAS NEGLIGENT UNDER THE JONES ACT FOR FAILING TO PROVIDE PLAINTIFF WITH A SAFE PLACE TO WORK.

Contrary to what appellant urges, a seaman injured in an assault by a fellow crewman may proceed on the theory of unseaworthiness and under the Jones Act (46 U.S.C.A. 688) for negligence in the same action, and a verdict or award may be based on either

or both theories.

McCarthy v. American Eastern Corporation
175 F.2d 724 (3d Cir.), Cert. Denied, 338
U.S. 868 (1949)

German v. Carnegie-Illinois Steel Corporation
156 F.2d 977 (3d Cir. 1946)

Balado v. Lykes Bros.
179 F.2d 943 (2d Cir. 1950)

In the instant case the trial court's award, as is specifically set forth in his opinion, was based on unseaworthiness. We have urged the correctness of this in preceding points. We further urge that the defendant is also liable to plaintiff for negligence arising out of its failure to provide plaintiff with a safe place to work. This may be summed up as follows:

The defendant or its officers of the vessel, faced with a very evident condition of homosexuality aboard the vessel should have lost no time in ridding it of those involved, especially when it reached the point of men kissing one another on the lips at mess (Appellee's pp. 43a-45a). There was a clear duty in defendant to maintain a safe vessel for its crew and proper discipline aboard it, and a vessel rampant with such rottenness is not a safe one. Again, upon Thompson's reporting to Schiffers the act: of homosexuality he had witnessed (Appellee's p. 51a) and after Schiffers had in turn reported it to the captain (Appellee's pp. 52a, 53a) it was clearly the Captain's duty to incarcerate the perpetrators, or at least to keep them under surveillance for their own safety as well as that of the remainder of the crew.

Medina's tendencies were well known to the Captain and the

Chief Steward for a long time before the assault (Appellee's p. 48a). Nothing was done about it -- indeed it was condoned. Schiffers reported the act of homosexuality to the Captain a full twelve hours or more before the assault took place (Appellee's pp. 52a, 53a). Medina and the other accused perpetrators were allowed to freely mingle with the crew. Both of the above failures to act constituted negligence under the Jones Act The standard of care required of ship's officers was not met.

See: Tetterton v. Arctic Tankers, 116 F. Supp. 429 (E. D. Pa. 1953)

The fact that Medina held a subordinate position to Thompson does not relieve the defendant of liability under the Jones Act. In other words, there need not be an officer-employee relationship to spell out liability on the part of the defendant.

In Johnson v. United States, 333 U.S. 46, 49 (1948) the Supreme Court states as follows:

> "While the acts of negligence underlying such accidents may reach higher into the management hierarchy than the one involved here, the Federal Employers' Liability Act compels us to go no higher than a fellow servant."

There is a wealth of authority to sustain our position that defendant here was guilty of actionable negligence.

In Jamison v. Encarnacion, 281 U.S. 635, 641, (1930) the Supreme Court through Justice Butler states:

> "'Negligence' is a word of broad significance and may not readily be defined with accuracy. Courts usually refrain from attempts comprehensively to state its meaning."

The Court also states in the Jamison case (supra) at P. 641:

> "As unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertance or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, a much graver breach of duty, was not negligence within the meaning of the Act."

The sum and substance of defendant's negligence was their failure to provide for Thompson's safety.

See: Jensen v. U.S., 184 F.2d 72 (3d Cir. 1950).

The duty owing to a seaman confronted with the situation that faced Thompson is aptly stated by Judge A. N. Hand, in Kyriakos v. Goulandris, 151 F.2d 132, 135 (2d Cir. 1925) as follows:

> "Seamen have no legal power to rid themselves of dangerous shipmates. That power rests with the officers of the vessel. If the officers choose to continue to employ a man who is known or should be known by them to be a source of peril to those who sail with him, when measures which might reasonably be expected to prevent resulting injury are not or cannot be taken, a resulting injury to a member of the crew is one for which the person injured may recover under the Jones Act, 46 U.S.C.A. 688. Koehler v. Presque-Isle Transportation Co., (2d Cir.) 141 F.2d 490."

See also Alpha S.S. Corp. v. Cain, 281 U.S. 642 (1930).

Although the factual situation in the Jamison case (supra) and Cain case (supra) involved assaults by "superiors" on their "subordinates", there is no limitation imposed by the Supreme Court that recovery be allowed only under those circumstances. There is also no limitation to be found in these Supreme Court cases that said assault must arise out of the master's business.

It is respectfully submitted that the above reasoning is

supported by Steely v. Kurn reported in 347 Mo. 74, 146 S.W., 2d 578, reversed 313 U.S. 545 (1941).

The Steely case arose under the F.E.L.A. and involved an injury to the plaintiff when he and three other employees were carrying a heavy steel rod. The plaintiff was injured when the man aiding the plaintiff at his end suddenly and maliciously released his hold resulting in an intentional injury to the plaintiff.

The Missouri Court reversed a verdict for the plaintiff because they reasoned that an intentional tort was not in furtherance of the master's business. However, on petition for certiorari, the Supreme Court stated (313 U.S. 545 (1941)):

> "Per Curiam. The petition for writ of certiorari is granted, and the judgment is reversed. 'Jamison v. Encarnacion, 281 U.S. 635." (313 U.S. 545)

On remand of the Steely case, the Missouri Court construed the Supreme Court reversal in the following language:

> "On certiorari, the Supreme Court of the United States in a per curiam . . . merely reversed the judgment of this court citing Jamison v. Encarnacion . . . The said court gave no reason for the ruling, other than the citation of said case. In this situation it must be assumed that said court construed the Jamison case to rule that the word 'negligence', as used in the Federal Employers' Liability Act includes a deliberate and intentional injury of an employee by another employee of equal station." (348 Mo. 1142, 157 S.W. 2d 212, 213 (1941).)

The language of Judge Frank in Koehler v. Presque-Isle Transp. Co., 141 F.2d 490, 491 (2d Cir. 1944) Cert. Denied 322 U.S. 764 (1944), is significant where he states:

> "An employer under the Jones Act is liable for

'negligence'. Jamison v. Encarnacion, 281 U.S. 635, 1930 A.M.C. 1129, and Alpha S.S. Corp. v. Cain 281 U.S. 642, 1930 A.M.C. 1133, teach us that 'negligence' as used in that statute must be given a liberal interpretation. We think that it includes any knowing or careless breach of any obligation which the employer owes to the seaman. Among those obligations is that of seeing to the safety of the crew. And there is no such safety if one of the crew is a person having the character of Todd. Consequently, the defendant is liable here because the ship's officers knew, or with ordinary diligence, should have known what Todd was like. In such circumstances, it is not material that Todd, when he assaulted plaintiff, was not acting in the course of his employment or in the interest of defendant. * * * In so far as Davis v. Green, 260 U.S. 349, and Atlantic Coast Line R.R.v. Southwell, 275 U.S. 64, indicate a contrary conclusion as to an ordinary employee, they are not in point since the obligations of a shipowner for the safety of seamen is substantially greater than that of an ordinary employer to his employees.[2]"

Footnote 2: "We have often had occasion to emphasize the conditions of the seaman's employment . . . which have been deemed to make him a ward of the admiralty and to place large responsibility for his safety on the owner. He is subject to the rigor-our discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers." Mahnich vs. Southern S.S. Co., 321 U.S. 96.

Therefore, on the basis of the above, it can readily be seen that defendant breached its duty of seeing to the safety of Thompson, and is therefore liable under the Jones Act.

THE RELEASE IN ISSUE IS NO BAR TO PLAINTIFF'S RIGHT TO RECOVER.

One of the principal arguments raised by the appellant during the trial and also in his brief is that Thompson could have availed himself of the services of numerous attorneys prior to his signing the release. This argument is without avail, for prior to and at the time the release was signed, Thompson did not have the services of any counsel. There is certainly a distinction between what one could have had and what one actually had. In fact, the appellant in its brief (p. 21) states:

> "It is true that Thompson concluded his settlement without actually having an attorney."

Garrett v. Moore-McCormack, 317 U.S. 239, 247 (1942) stands for much more than what the appellant says it does. In other words, not only did that case state that the burden of proof in a seaman's release case is on the shipowner to show that it was fairly made, but in addition the Court stated:

> "He must affirmatively show that no advantage has been taken; and his burden is particularly heavy where there has been inadequacy of consideration."

Over 130 years ago Judge Story in the case of Harden v. Gorden, Fed. Case 6047 (CCMe 1823) laid down the application of the "wardship theory" in regard to seaman's releases. The pertinent portion of the Harden case is found in the trial court's opinion (Appellant's pp. 23a, 24a).

An English case decided in 1825, The Minerva, 1 Hagg. 347, 166 Eng. Rep. 123 at 126-127, aptly states the position that

seamen are in when dealing with shipowners:

> "On the one side are gentlemen possessed of wealth, and intent, I mean not unfairly, upon augmenting it, conversant in business, and possessing the means of calling in the aid of practical and professional knowledge. On the other side is a set of men generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information and almost ready to sign any instrument that may be proposed to them, and on all accounts requiring protection, even against themselves. Everybody must see where the advantage must be between parties standing upon such unequal ground, and accordingly these special engagements so introduced into the mariners contract lean one way, to the disadvantage of the mariners, and to the advantage of their employers, by increasing the duties of the former and diminishing the obligation of the latter."

See also Maruaga vs. U.S. et al, 172 F.2d 318, 320, (2d Cir. 1949) where the Court of Appeals in reversing the dismissal of a seaman's libel states:

> "We cannot find support in the record for the finding that the appellant signed the release with adequate knowledge of his physical condition and understanding of his legal rights. * * * He was unskilled in the law and of necessity relied upon what the claim agent said. The burden was on the appellee to show that the seaman signed the release with 'full understanding of his rights.' Garrett vs. Moore-McCormack Co., Inc., 317 U.S. 239. This is an essential prerequisite to the validity of a seaman's release. Bay State Dredging and Contracting Co. v. Porter (1 Cir.), 153 F.2d 827, 1946 A.M.C. 1310. And seamen who are induced to sign releases without benefit of counsel and are unfamiliar with their legal rights are not to be held bound. Hume vs. Moore-McCormack Lines, Inc., (2d Cir.) 121 F.2d 336. This appellant understood when he signed the release that he was ready for work and hoped to be re-employed."

In German vs. Carnegie-Illinois Steel Corp., 169 F.2d 715, 3d Cir. (1948), this Court held a release invalid, even though the plaintiff was represented by counsel, stating:

"As was stated in Garrett vs. Moore-McCormack Co., 317 U.S. 239, 1942 A.M.C. 1645, under the prevailing rule treating seamen as wards of admiralty, there is a close analogy between seamen's contracts and those between fiduciaries and beneficiaries. Said the Court, 317 U.S. at page 247, 1942, A.M.C. at page 1651.

> "'Whether the transaction under consideration is a contract, sale or gift between guardian and ward or between trustee and cestui, the burden of proving its validity is on the fiduciary. He must affirmatively show that no advantage had been taken; and his burden is particularly heavy where there has been inadequacy of consideration.' (Emphasis supplied)

"With respect to seamen's releases, the court enunciated the following rule, 317 U.S. at page 248, 1942 A.M.C. at page 1651:

> "'Such releases are subject to careful scrutiny. "One who claims that a seaman has signed away his rights to what in law is due him must be prepared to take burden of sustaining the release as fairly made with and fully comprehended by the seaman." Harmon vs. United States (5 Cir.), 1932 A.M.C. 1445, 59 F. (2d) 372, 373. We hold, therefore, that the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seamen at the time of signing the release are relevant to an appraisal of this understanding.
>
> "'This general admiralty rule applies not only to actions for maintenance and cure but also to actions under Section 33 of the Merchant Marine Act. That law is to be liberally construed to carry out its full purpose, which was to enlarge admiralty's protection of its wards.' (Emphasis supplied.)"

In Bonici v. Standard Oil Co., 103 F.2d (2d Cir.) Cert.

Denied 308 U.S. 560, 636, Judge Clark states the following:

> "Libellant is a person of some education, able to read and write, and the court held, as indeed his counsel conceded, that he knew he was signing a general release. He testified, however, that he did so because the doctor for respondent told him that there was nothing the matter with his arm and that he would be ready to work in five or ten days."

In the case at bar, the lower court made the following findings (Appellant's pp. 24a, 25a):

> "How can it be claimed that, as to a seaman, a settlement is fairly arrived at, when the shipowner, though innocently, misrepresents both the facts and the law to the seaman, and, by claiming he is practically well, impliedly urges the seaman to settle for an inadequate sum, all this at a time when that seaman lacks his own advisors on either the facts or the law? In short, it would appear, that as to this matter of Thompson's neuropsychiatric syndrome, or anxiety complex, admittedly real, but a difficult thing at best to either diagnose or prognose, both Dr. Farr and the Stapleton Hospital were much mistaken as to its future effects and continued existence. Had defendant not advised Thompson of Dr. Farr's report or insisted that it was right, and that he was practically a well man, that would have been one thing. For then Thompson would presumably have acted upon the basis of his own judgment alone, not as influenced by the mistaken viewpoint and technical information of defendant. Or, had Thompson himself been properly represented legally, with his own medical advices on which to rely, then, even though defendant urged the correctness of its views, Thompson would have presumably settled upon the basis of his own considered and properly advised judgment. Under either of the above circumstances, the release would doubtless bind, as being 'fairly arrived at.' Bonici v. Standard Oil, (2 Cir. 1939) 103 F.2d 437; Sitchon v. American Export Lines, (2 Cir. 1940) 113 F.2d 830. But here, to the contrary, not only did Thompson not have the aid of any legal and medical advices of his own, but the defendant, which did have that aid, insisted that its advices were correct, and in essence urged Thompson to settle for an amount now shown to be clearly inadequate, when it turns out that defendant's representations to Thompson as to his condition were, in fact, incorrect. Thus this seaman, in the

> same inferior position as a ward in dealing with his guardian, was induced to settle for an inadequate sum by the incorrect representations of the other party, in a superior position to him. Such a settlement certainly is not 'fairly arrived at'."

The appellant cites in his brief (pp. 19, 20) the case of McGraw v. States S.S. Co., 116 Fed. Supp. 446, as authority for setting aside the release in issue. The McGraw case was considered by the trial court in the following manner (Appellant's pp. 25a, 26a);

> "Nor are McGraw v. States S.S. Co., (N.D. Calif. S.D. 1953) 116 F. S. 446 and Wilson v. McCormick S.S. Co., 1940 A.M.C. 1004 (State of California) to the contrary. For in McGraw, the Court's opinion states that the shipowner 'was in no better position to determine the clinical or medical facts than was libellant.'"

Therefore, by virtue of the above it is respectfully submitted that the "release" does not bar Thompson's right to recover the indemnity awarded by the trial court.

CONCLUSION

Plaintiff respectfully submits that the Findings of Fact and Conclusion of Law by the District Court should be affirmed in its entirety, with costs.

Respectfully submitted,

Silas B. Axtell
Attorney for Appellee

Martin G. Stein
John A. Gleason
Of counsel

APPENDIX for APPELLEE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WILLIAM THOMPSON,
Plaintiff,

-against- : Civil Action No. 1164-52

COASTAL OIL COMPANY,
Defendant.

Deposition of WILLIAM SCHOPF, taken by Defendant pursuant to oral stipulation, at the offices of Messrs. Hanrahan & Brennan, 67 Wall Street, New York 5, N. Y., on February 9, 1954, at 2:00 p.m.

APPEARANCES:

SILAS BLAKE AXTELL, ESQ.,
Attorney for Plaintiff,
15 Moore Street,
New York 4, N. Y.,
By: JOHN A. GLEASON, ESQ.,
MARTIN G. STEIN, ESQ.,
Of Counsel.

FRANCIS M. McINERNY, ESQ.,
Attorney for Defendant,
665 Newark Avenue,
Jersey City, N. J.,
By: Messrs. HANRAHAN & BRENNAN,
67 Wall Street,
New York 5, N. Y.,
By: MICHAEL E. HANRAHAN, ESQ.,
Of Counsel.

(W I L L I A M S C H O P F, called as a witness by defendant, having first been duly sworn by the Notary Public, testified as follows:

DIRECT EXAMINATION BY MR. HANRAHAN:)

* * *

(Page 10, line 3 to Page 11, line 11)

Q There was a union meeting preceding that assault, was there not? A That's correct.

Q Did you attend that union meeting? A Yes.

Q Who called the union meeting? A I think--I won't say. I just don't remember.

Q Do you know the purpose of it? A Yes. The purpose was--I guess--what is his name?--Thompson, he called it. We were trying to get him not to call in the Coast Guard, because it would be bad publicity for our union for this thing.

Q How long did this union meeting take place? A It couldn't have been too long. I would say 15 or 20 minutes.

Q Do you remember who was at the meeting? A The pump man, I think his name was Young, Pittaway, Williams, myself and the cook.

Q What did Thompson say at that meeting? A He wanted Medina to get off the ship.

Q Did he say for what reason? (11) A Because he was a fruit.

Q Did he make any statement at that meeting about witnessing a homosexual act in your cabin the night before? A I don't remember if he did. It is possible; I don't remember.

Q Were there any words at that meeting between Thompson and Medina? A Yes. We asked him if he was going to get off the

ship. We asked Medina if he would get off the ship. We wanted to try to get the thing over as smooth as possible. And he said no. So then Thompson cursed him.

* * *

(Page 12, line 11 to Page 13, line 10)

Q How was the assault brought to your attention? A I was in my bunk, starting to go to sleep and Pittaway burst into the forecastle and said that Medina hit the second cook with a meat cleaver.

Q What did you do after that? A I went up and told the old man to come back to give the guy first aid.

Q Did you see Thompson at all? A After I told the old man, I came back there and everybody was in it, I think it was the messman's forecastle. The purser was there. He was the ship's doctor. He was bandaging him already.

Q Did you see Medina after that? (13) A Yes, because I went on watch. I had first wheel that night. We stood out in the wing, because the ship was on gyro, automatic steering, and we were told to watch him, because that's--

Q Where was he? A He was on the port side, just outside the old man's room, chained to a vent pipe or, rather, a gutter pipe.

Q Were you instructed in any way to guard him or anything of that sort? A Just to watch him.

* * *

(Page 14, lines 14 to 23)

Q By the way, when Thompson came to your room on the

evening of the 12th, was the door open or closed? A The door was closed, but it wasn't locked.

Q Was there a lock on it? A Yes.

Q Who opened the door for him? A It is a shipboard custom to knock twice and then just open the door and walk in.

Q Did he knock that night? A I think he did, yes.

* * *

(Page 15, lines 4 and 5)

CROSS-EXAMINATION BY MR. GLEASON:

* * *

(Page 21, lines 7 to 22)

Q It has been testified that there were gifts given by Medina to some members of the Deck Department. Did you ever see any gifts or did any gifts come to your attention such as a watch, a wrist watch, that was a gift from Medina to one of the Deck Department? A I think he gave one to Pittaway as a joke.

Q What do you mean by a joke? A Well, Pittaway didn't have a watch. We always use those round pocket watches and he told him, "Why don't you buy me a watch?", in that tone of voice, and what do you call it, did it as a joke.

Q Coming down to exactitude on that-- A Maybe he meant it as a present and the other guy thought it was a joke.

Q You thought it was a joke, anyway? A Yes, I thought it was a joke.

* * *

(Page 24, line 3 to Page 28, line 7)

Q Now, Medina was known by pet names aboard the ship, wasn't he? A That's true.

Q Feminine names? A That's true.

Q Do you remember the names that he was known by? A Well, the crew used to call him Sadie and the chief engineer called him Gloria; that I remember.

Q Did you ever hear anybody call him Rosina? A They called him everything. I don't know if they did.

Q Did you call him by any of those kinds of names? A Well, Sadie was the one that stuck with him most. The crew called him Sadie, so everybody started to call him that.

Q Did you call him Sadie? A Yes.

Q Did you ever hear him called Sadie or any of these feminine names by any of the officers? A Well, I just stated that.

Q You did, and I would like you to state the particulars (25) of that. You stated, I think in your own words, the chief engineer called him Gloria? A Yes.

Q When did you hear the chief engineer call him Gloria? A Whenever he spoke to him.

Q How many times, approximately, in the time between Medina's signing on the vessel for the first time and the assault on Thompson, did you hear the chief engineer call him Gloria, approximately? You may say, if you want to, only a few, quite a few or many, many times. Those would be the three extremes, wouldn't they, and the

middle ground? A Quite a few times, I would say.

Q Now, Mr. Schopf, did you ever hear, before this assault on Thompson, any of the other officers of the ship call him by a feminine name? A If they did, I don't remember. It is quite possible.

Q Did you ever hear him called a feminine name in the presence of any of the other officers of the ship, besides the chief engineer? A I don't remember. Something that little, you just don't remember.

Q Is it your testimony that he wasn't called by feminine names in the presence of any of the other officers (26) or is it your testimony that you don't know? A I mean I don't remember. You are trying to pin me down to something, to one specific thing.

Q No, Mr. Schopf, you were there and we weren't, and I am not trying to pin you down to dates or anything like that. All I am trying to do is to get your knowledge of what went on on that ship. Where you have no knowledge, feel free to say "I don't know." But where you have knowledge, please testify as to it. Will you do that? A That is what I am trying to do, but I am not going to say something that I am not positive of and then get called back on it, if they have a trial or something. When I say something, I want it specific. It's either yes or no or I don't remember.

Q You be specific, then. Did you or did you not hear any of the crew call Medina by a feminine name in front of any of the other officers? A Well, everybody called him. He just had a name

Sadie. So if an officer was in the room--the officers don't mingle too much.

Q My next question may clear it up. It was common knowledge among the crew, both licensed and unlicensed, was it not, during the three or four months before this assault. (27) that Medina was queer? A That's true.

Q And when I say "queer", I mean sexually aberrated; is that right? A Yes.

Q What were the manifestations of his sexual aberration that you noticed? A Well, he was feminine. There was just no doubt about being feminine.

Q What are the characteristics of femininity that struck you? A The way he would hold his hands, just like a woman.

Q Did he walk like a woman? A I guess he did.

Q A woman usually sways her body more in walking, her hips especially, than a man does. That is true, isn't it? A He had a short walk. I would say yes.

Q A mincing walk, would you call it? A Yes, that would be a good word.

Q In other words, he walked more like a woman than a man; is that right, sir? A Yes.

(28) Q Did he talk like a woman? A He had the actions--yes, I would say he talked, had the voice of it.

Q Did he act, with his hands, like a woman? A Yes.

Q And this was continuous, was it not? A Yes.

* * *

(Page 29, line 12 to Page 30, line 3)

Q You knew him very well, didn't you? A I would say yes.

Q How many times had he been in your room, yours and Pittaway's room, prior to the night that you have been asked about? A I couldn't count the times.

Q How many did you say? A I just couldn't go by--

Q Countless times, did you say? A Quite a few times he was down there, yes.

Q Would you say he was down there very nearly every evening? (30) A No, I wouldn't say every evening, because we were in port; we were at sea, we would be coming in, it would be different.

* * *

(Page 30, line 23 to Page 32, line 9)

Q A lot of the time; is that right? (31) A He was down there quite a lot, yes.

Q During the times he was down there, he would very often be in one of the bunks; is that right? A Oh, no, definitely not.

Q Was he ever in one of the bunks, except the night of January 12th? A No.

Q You never saw him in any of the bunks; is that right? A No. He used to sit--we had a chest of drawers with a radio on it, and he would stay and hear the radio, because when you are at sea, no matter how good a radio is, the station you are listening to

will fade out and he would tune it up again. You have to play with it, play with the radio, to keep it on the station you want. When the ship rolls, it will change, and different courses.

Q What else was there to sit on in that room? A There was a chair. The radio was on this chest of drawers and he would sit next to it.

Q Every time he came down on these innumerable times, these countless times, before this night, he would sit on the chair or this radio business-- A Yes.

Q Never any of the bunks; is that right? (32) A It's a shipboard custom not to sit on a guy's bunk. It isn't very good manners.

Q What you are testifying to is that men don't go into their shipmate's rooms and sit on the bunks; is that right? A That's a custom, but if they are going to have a party in the forecastle and they run out of chairs, they will sit on the bunk. But if you come in a room and there is any other place to sit, you definitely don't sit on a guy's bunk.

* * *

(Page 33, lines 12 to 19)

Q And yet there were some men on one of the bunks, weren't there? A They were wrestling in that case.

Q Please answer my question. There were some men on one of the bunks; is that right? A Yes.

Q Who were those men? A Pittaway and Medina.

* * *

(Page 34, lines 2 to 5)

Q Will you tell us the size of that bunk; not the bunk you were on, the bunk they were on? A They must be about three feet wide, with bunk bars on them.

* * *

(Page 34, line 16 to Page 35, line 20)

Q They are just big enough for one man; is that right?

A That's right.

Q That is the reason they have the pipes around there, because you have very little to roll before you are out of bed; is that right?

A That's right.

Q And yet these two men were wrestling on that bed; is (35) that right, sir? A Yes.

Q How big was the floor space in that room? A It is about 20 feet wide.

Q Plenty of floor space around the bunks and around the different--I suppose there was a wash basin in the room, wasn't there?

A Yes.

Q And I suppose there were lockers in the room? A Yes.

Q And the different other accouterment that seamen have nowadays in their forecastles; is that right? A Yes.

Q A fan, perhaps, and that sort of thing; right? A Yes.

Q And in spite of that, there was a floor space of about 20 by 20 feet, clear; is that right, sir? A Yes.

Q And they weren't wrestling on the floor? A No, not that I remember.

* * *

(Page 37, line 6 to Page 38, line 8)

Q When Thompson knocked at the door, did you say "Come in"? A No, because it is the custom that you knock twice, just bang-bang, and open the door.

Q When Thompson came in, you said to him, "It's a good thing you came"? A Yes, and I was kidding about it.

Q That was a joke, too, when you said that; is that right? A Yes.

Q Did you always say to Thompson, "It's a good thing you came", when he came down into your forecastle? A Say that again.

Q Did you always say that to Thompson-- A No.

Q --when he came down to your forecastle? A No, just that one time.

Q Did you ever say that to anybody before, that it is a (38) good thing that they came? A No, not that I remember.

Q In all your service on these different vessels that you have stated to us, did you ever say on any other occasion to anybody that entered your forecastle, "It's a good thing you came"? A I wouldn't have the reason to say it. If I did, I don't remember.

* * *

(Page 48, line 7 to Page 50, line 14)

Q Did you go to the union delegate of the Steward's Department and tell him that you didn't believe that Medina was guilty of a homosexual act? A If I did, I don't remember.

Q Did you go to the chief steward and tell him? A It was my general opinion on the whole ship--well, just blank, definite, there was just no homosexual business going on in that forecastle. That's what made me mad. It was just an out and out lie.

Q You were mad, you say. Let's get down to that. That's what made you mad. You are not talking about being mad now? You are talking about being mad then? A No, I wasn't mad. I just didn't like telling lies about the guy.

Q Now, we have two things. We have got you thinking at that time that they were telling lies about Medina and we have got you mad, according to your own testimony. (49) A Telling lies about Pittaway.

Q You were mad and there were lies going on about Pittaway and Medina; is that right? A The charges were false against the guy.

Q The captain left himself open for you people to visit him at any time, didn't he? A It is not a ship's custom to go running to the old man.

Q Is it a ship's custom to go to your immediate superior? A Who would be my immediate superior?

Q Who would he be? A I mean the chief mate.

Q Did you go to the chief mate and say, "By God, Chief Mate,

I'm mad because there are lies being told about Medina and Pittaway"? Did you do that? A It is not the crew's custom to go to the officers.

Q Did you do that, sir? A No.

Q When you went to the meeting, you had your say, didn't you, like everybody else? A I didn't talk much at the meeting.

Q Did you say anything? (50) A I don't remember. I guess I did, but I was willing to let the thing come up -- we have our own trials in the union and I was willing to let the thing come up in the union and let the truth come out, but to bring the Coast Guard, it sort of blackens the name of our union to have so much trouble on a ship. We don't want the Coast Guard into it. We wanted the union to take care of it. We have our own trial system; we elected our own juries and let the truth come out there. Then, that would be the end of it. There would be no publicity.

Q All I asked you, Mr. Schopf, was this: did you talk at the union meeting? A If I did, I don't remember, because there was so much talk going on back and forth.

* * *

(Page 63, line 4 to Page 66, line 19)

BY MR. GLEASON:

Q Did you see the assault? A No. How could I see the assault? I was down in my bunk. I have already sworn to that.

Q Do you know whether you were down in your bunk at the time it happened? A Yes.

Q You were? A Yes. Because Pittaway came down right after that.

Q You say that following the assault you were told about it down in your bunk? A Yes.

Q Did you go up topside? A I went up amidships to tell the old man to get aid for the guy, for Thompson.

Q Did you see Thompson? A After telling the old man, I came back and I could see the light out there and everything. He was sitting in the messroom forecastle and the purser was bandaging his (64) head up.

Q Did you see his head? A I took a look at it. I didn't stay around too long.

Q What did you see when you looked at his head? A It was bloody, but I didn't stay too long, because it makes me sick.

Q Did you see gashes in his head? A I saw bloody bandages. That was enough for me to take off.

Q Did you see the instrument with which he was hit?

A Only about two days later when we was down in Corpus-- I don't know whether it was the Coast Guard and some other fellow-- they had Exhibit A there, the cleaver.

Q Will you describe the cleaver to us? A Just an ordinary meat cleaver. It's about a foot long, I guess, rectangular, for cutting meat.

Q Is it a foot long with the handle? A The handle is about four inches. I would say about 16 inches.

Q How much does it weigh? A I don't know; about a pound or two, I guess.

Q Sharp? A Oh, yes.

(65) Q Was that particular one sharp? A I guess so.

Q Was the handle nicked in any way? A I don't remember. I didn't handle it. They just had it laying there.

Q A dangerous looking weapon? A I guess so.

Q Do you know where it was kept? A In the galley.

Q Do you know whether the galley was locked every night after mess? A I think on different ships -- some ships lock them up and some don't, but on that ship they did lock the galley.

Q Every night? A Yes.

Q And the meat cleaver would ordinarily be locked inside; is that right? A Yes.

Q So, in order to get that meat cleaver, Medina had to get the key; is that right? A Yes.

Q Do you know where he got the key from? (66) A I heard hearsay that he got it off the chief cook. He asked him for the key.

Q Do you know when he asked him for the key? A I don't know. I just heard it from the other guys, that he asked the chief cook for the key.

Q Do you know, from hearsay, or from what you saw in regard to blood or anything like that, do you know where this assault took place on that deck? A No. The only thing I heard is from

reading the reports and being on the ship. I knew it happened. I think it was in the port after door of the messmen's forecastle. They have a big athwartship forecastle there.

Q Up on the boat deck? A Yes. That's from what I heard. I wasn't there.

Q Was it aft of the after house or was it to the starboard side of the after house? A I think it was aft.

Q Aft of the after house? A Yes, I think so.

* * *

(Page 68, line 4 to Page 70, line 9)

Q Did you hear anybody try to stop Medina from leaving the meeting? A I don't remember anybody stopping him. He just asked to be excused and he left. If it happened, I don't remember. I wouldn't say yes or no.

Q Did you hear anybody say, "Come back, we have to decide this question"? A I don't remember.

Q It wasn't decided when he left, was it? A No. The only thing I can remember, he just left.

Q Did it go through your head at that time that he might have meant harm toward anybody at the meeting? A No. I just thought he was just leaving.

Q Why did you think he left? A I don't know. I thought it was sort of funny that he should leave. He didn't stick up for himself or anything. When the guy cursed him, well, he had other plans for the guy. He was going to chop him up, but I guess he was--

Q Did that go through your head, that he might have left in order to waylay Thompson? (69) A No.

Q Beat him up or something like that? A When I was leaving, I thought I saw him in back of the house there, but I wasn't sure. I have that down in the statement there. It is nothing new.

Q In other words, he was in back of the after house?

A I thought I saw him back there, but I wasn't positive.

Q Was he lurking any place? A He was back of the house there, laying against it. I thought I saw him.

Q Did you speak to him? A No. I thought he was going to stay back there to eavesdrop.

Q To eavesdrop on the meeting? A Yes.

Q There was no need for him to eavesdrop on the meeting, was there, Mr. Schopf? A It was a queer case from beginning to end.

Q You thought it was queer, then, that he would be hanging around the back of the after house, did you? A Yes.

Q But you didn't remonstrate with him in any way and (70) tell him to go back to the meeting? A No.

Q I just want to go into one thing. Was it the consensus of that meeting that Mr. Medina should resign from the ship?

A We thought it would save a lot of trouble if he would. We would have liked to have seen him get off. That would have been the end of the trouble and make things run smooth again.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WILLIAM THOMPSON, :
Plaintiff, :
:
-against- : Civ. 1164-52
:
COASTAL OIL COMPANY, :
:
Defendant. :

Deposition of MATTHEW CAPLIS taken at the office of Silas B. Axtell, Esq., 15 Moore Street, New York, N.Y., on Monday, January 11, 1954, at 3:00 o'clock p.m., pursuant to notice.

Appearances:

SILAS B. AXTELL, ESQ.,
Attorney for Plaintiff,
(John A. Gleason, Esq.)

FRANCIS M. McINERNY, ESQ.,
Attorney for Defendant,
MESSRS. HANRAHAN & BRENNAN, of Counsel,
(Michael A. Hanrahan, Esq.)

(Page 2, line 3 to Page 3, line 5)

(IT IS STIPULATED AND AGREED) * * * all objections, except as to the form of the question, are reserved to the time of the trial.

MATTHEW CAPLIS, having been first duly sworn by the Notary Public herein, testified as follows:

DIRECT EXAMINATION BY MR. GLEASON:

Q Mr. Caplis, how old are you? A I am 32 years old.

Q Are you married? A No; single.

Q Do you live at home? A No, not permanently. I'm a seaman. I also have a house of my own in the mountains.

Q What would you consider to be your permanent address? A My mother's home, in Brooklyn.

Q What is it? A 29 East 3rd Street.

Q Under what name? A Caplis.

(3) Q The same name? A Yes, sir.

Q Have you a phone there? A Yes; my mother has a phone there.

Q Will you tell us that phone number? A Sterling 8-2934.

* * *

(Page 6, lines 4 to 15)

Q Did you have occasion, during November and December, and the early part of January of the next year, to overhear conversations in regard to Medina?

MR. HANRAHAN: Objection. Hearsay.

MR. GLEASON: It goes to the question of notice to the officers or the personnel.

However, I will rephrase the question.

MR. HANRAHAN: I will reserve the objection.

MR. GLEASON: Any time that the form of a question is repugnant to you, if you will rephrase the question for me, I will put it in that way.

* * *

(Page 8, line 1 to Page 9, line 4)

Q Did Medina resent it? When you heard him called "Susie" or "Sadie", or anything like that, did he seem to resent it, or did he object to those appellations? A No, that was the funny part, because Medina never objected whatsoever to any of those names. He just took them as if it was natural, and, I mean, he even made a statement at one time there, in my presence, to one of the crew members, that started kidding him about being queer, that "You do things your way, and I do things my way, you know."

"We each have our own way of doing things."

He had no objection whatsoever.

Q What did he mean by "things"? Let's get down to particulars. A They would be saying, how would he like to shack up with some man, or something to that effect.

And he would say, "That's none of your business. I do things my way, you do things your way."

Q Was it in conversations that had to do with sexual intercourse? A Yes, it was.

Q How many times did you hear Medina say, in public, to you or to others, that he did things, sexually, (9) his way, and let others do it their way?

MR. HANRAHAN: I think you are leading too much, Mr. Gleason. He hasn't actually said that.

MR. GLEASON: I will withdraw that.

* * *

(Page 11, line 19 to Page 14, line 21)

Q Were you told, on a certain date in January, by Thompson, the plaintiff in this action--William Thompson--that he had witnessed something? A Yes, sir, he did, he told me that. I was acting as steward department delegate, when he brought it to my attention.

(12) Q Had you been the stewards' delegate on this vessel ever since you had come aboard? A No, sir, I wasn't. But two or three weeks after I came on board, I was elected stewards' delegate.

Q Will you explain, just in case we have somebody who doesn't know about it, about this stewards' delegate, or the different delegates aboard a vessel? Will you explain just what is a delegate aboard a vessel, who they are aboard the average vessel, a tanker, and what is their function? A There are at least three delegates aboard a ship, one for every department. Sometimes there are four, which we call him the ship's chairman. Their job is to take up any complaints of the union crew members, and try and settle them aboard the ship, if possible, or to bring them to the proper authorities ashore, to the proper union authorities.

Q Is this function limited to altercations between crew members, or does it have to do with complaints of crew members against one another? A Complaints of crew members, also.

Q And when Thompson spoke to you, do you remember what date it was? A No, sir, I couldn't tell you exactly.

(13) Q If I said that it was-- A (Interposing) It was approximately the day before that accident took place aboard that ship.

Q Involving Thompson? A That's right.

Q Do you know what time of the day it was that he came to

talk to you? A No, sir, I couldn't tell you exactly the time of the day; I think it was night time.

Q Do you know where it was that he talked to you? A I'm not positive where; I think it was in my forecastle that he came to me.

Q And when you say forecastle, what do you mean? A My room.

Q Your room, is that right? A Yes, sir.

Q And Thompson was not one of your room mates? A No, sir, he wasn't.

Q Did he come purposely, that is, did he have the appearance of coming purposely to make a statement to you? A Yes, sir, he did.

Q Did he make the statement? A Yes, he did.

Q At once, upon coming into your forecastle?

(14) A He made the statement to me that he wanted to know what could be done about it.

Q And in the statement, did he tell you t he had witnessed an unnatural--

MR. HANRAHAN: I object to that as leading.

Q What was the general nature of the complaint or statement to you? A That he had found Pettiway and Bill Schopf and him in intimate relations in Pettiway's forecastle, and he wanted to see what action could be taken on this; that Medina be removed, and these other two fellows, from the ship, on their arrival in port, at Corpus Christi.

Q At any time, did he ask you to institute proceedings that

would take away Medina's--

MR. HANRAHAN: You are leading.

Q I think I should be able to ask this:

At any time did he ask you to take away, or institute proceedings to take away Medina's license? A No. He didn't want to take away Medina's license, his shipping book. He wanted him to leave the ship; that's what he wanted, for Medina to leave the ship.

* * *

(Page 17, line 19 to Page 41, line 14)

Q How far away was your forecastle from the doorway, the nearest doorway to where you held the meeting? A My forecastle?

Q Where did you hold the meeting? A I told you, on the boat deck, in the pumpman's (18) room.

Q In the pumpman's room? A Yes.

Q Will you tell me how far was it from the door of the pumpman's room--you mean the pumpman's forecastle, is that right, sir? A That's right.

Q How far from that pumpman's forecastle was it to your forecastle? A Approximately fifty feet; approximately fifty, seventy feet.

Q And how would you go to get to it? Tell us in particularity, please. A Facing aft, it would be on the left-hand side of the ship, facing aft. You proceed about twenty-five feet--

Q Along what? A Along the deck, the outside deck.

Q The outside flush deck? A That's right. No, not the

flush deck, the boat deck.

Q The boat deck? A Yes. And you take a right-hand turn, and proceed about twenty-five foot more.

(19) Q You take a right-hand turn. And where would that bring you? A Right into my forecastle.

Q You went aft how many feet? A Approximately twenty-five feet.

Q You made a right-hand turn. And where were you when you made a right-hand turn, at the entrance to an alleyway, or something like that? A No, sir; still on the outside deck.

Q On the boat deck? A That is correct, sir.

Q Did the door to your forecastle lead out on the boat deck? A Yes, sir, it did.

Q And the door to the pumpman's forecastle, that led out to the boat deck? A Yes, sir.

Q So it wasn't necessary for you to go into any enclosed space? A There was no way of my going to any enclosed space, unless I went out of my way completely.

Q Were you going directly to your forecastle? A Yes, sir, I was.

Q Did you overhear Thompson at any time ask (20) somebody the way back to his forecastle? A No, sir, I didn't.

Q Or the way out of this room? A No, sir, I didn't.

Q Did you show him the way out? A No, sir. It wasn't a case of showing the way out. There were six of us, and we were

all going in the same general direction. The other men had to pass my forecastle to get to their own.

Q And did Thompson also have to pass your forecastle door to go to his forecastle? A Yes. There was other ways of going but that was the closest, the most convenient way.

Q Did all six walk out at the same time? A No, sir; the pumpman didn't walk out with us.

Q How many, besides the pumpman, were left in that room, after Medina went out? A There was myself, the deck delegate, Thompson, Pettiway, and Bill Schopf.

Q Pettiway and Schopf stayed there, did they? A No, sir; they were coming out with us at the time.

Q I mean when Medina left? A When Medina left, they stayed there, yes, sir.

Q How many minutes before the end of the (21) meeting was it that Medina left? A About fifteen minutes before.

Q Did you see him go anywhere, or did you take any notice of what he did? A No, sir; I couldn't see him go anywhere; I was in the room.

Q Did the five of you that were left there all go out the door at the same time? A Yes, sir; we were all leaving, one after the other.

Q Where was Thompson in that bunch? A I led the way, and then Thompson was about the third man following.

Q Were you all in sort of single file? A Yes, all in single

file, all right together. There wasn't six-foot difference between the bunch of us.

Q And Thompson was the third man in the bunch, is that right? A That's right.

Q From you? A Yes, sir.

Q And now, where did you go when you left the pumpman's door? A Again?

Q Yes, I want it with some particularity.

Off the record.

(22) (Discussion off the record.)

MR. GLEASON: The witness has made a diagram, upon the request of counsel which shows, as he has explained, the boat deck on the after end of the ship. It shows the door of the pumpman's forecastle on the starboard side of the ship, about amidships of the after house. It shows a line around the after side of the after house, in which the witness says that these five men proceeded. It shows the door to his -- the witness' -- forecastle, and also Medina's forecastle, on the port after corner of the after house, with the door facing aft. It shows, also, a ladder, which is just aft of this door, down which, the witness says, Thompson and the others besides himself, and Schopf, would have to go in order to get to their forecastles.

You drew this diagram, did you, Mr. Caplis, to explain to counsel just exactly the location of these doors? Is that right, sir?

THE WITNESS: Yes, sir.

MR. GLEASON: I will ask to have this marked for identification.

(The paper referred to was marked (23) Plaintiff's Exhibit 1 for identification.)

BY MR. GLEASON:

Q Now, during the time that you went around this after house, was Thompson in back of you? A He was approximately two men in back of me.

Q Something happened to Thompson, didn't it? A Yes, sir.

Q And where was it that something happened to Thompson? Where was Thompson when something happened to him? A We were just going around the corner, as you see it in that diagram there.

Q When you say "the corner", you mean the starboard after corner? A That is correct, sir.

Q Of the after house, is that right? A Yes, sir.

Q And I take it that you were almost in single file?

A We were.

Q Was it dark on deck? A Yes, sir, it was very dark on deck. You couldn't see your hand in front of you.

Q Were there any lights at all to light up the (24) deck?

A No lights at all. There was one light back aft, but it gave no light for the deck itself.

Q Where was the bridge on this tanker? A Up amidships.

It's not on that diagram.

Q Were there no lights to light up the area around the after house? A No lights on in the after house at all.

Q Now, was it a clear night? A No, sir, it was a very dark night. The sea was calm, and all that, but it was a very dark night.

Q A moonless night? A Yes, sir.

Q And a starless night? A That's right.

Q What time of the night was it, sir? A Approximately eight o'clock in the evening.

Q What did you hear or see after you had gotten around that corner? A I had gone around the corner when I heard the commotion behind me. When I was passing, I didn't see anyone, or nothing to that effect. But on going back, then I saw Medina was standing there, and Thompson was on the deck, and the blood was pouring out of his head. The three of us grabbed Thompson (25) and took him into my forecastle.

Q Did you see Medina? A Yes, sir.

Q You say that Thompson was on the deck. You mean that he was lying on the deck? A Yes, sir.

Q In which way was he facing? A What?

Q Where were his head and his feet? A Sir, I couldn't tell you exactly the position that he was lying in.

Q What was Medina doing when you saw him? A Medina was standing there, and he had a meat cleaver in his hands.

Q Did you see blood on the meat cleaver? A No, sir, I didn't.

Q Did you see blood around Thompson? A Yes, sir; blood all over him.

Q You say that you couldn't see your hand in front of your face. How were you able to see blood on Thompson? A When you come out of a lighted room, you can't see, I mean. But after a few minutes your eyes get accustomed to the darkness.

(26) Q And you could see that there was blood spilling there? A Yes, sir, you could.

Q From where? A From Thompson's head.

Q Did you see Thompson's head? A I didn't examine his head, but--

Q You knew something was wrong, did you? A I did.

Q Did you hear any sounds? A No, sir, no talking went on.

Q Did you hear Medina say anything to Thompson? A No, sir, I didn't. Medina said something, but I don't know what it was. I mean, my memory, I forget what he said, to tell you the truth of it.

Q Can you approximate what he said, approximate his words? That is, paraphrase his words? You don't have to give it word for word, if you don't remember. A I can't give it exactly, but it was to the effect that, "I got you, you son-of-a-bitch", like that type of a statement that he made, you know.

Q Did you hear him say that? A Yes, sir. I heard him

say something to that effect, but his exact words, I can't give you.

(27) Q But you understood it to be to that effect? A Yes.

Q And was it in Medina's voice? A Yes, it was in Medina's voice.

Q Did he have a voice that was different from other people? A It was an effeminate voice, a very high-pitched voice.

Q Was it that voice that you heard, that high-pitched voice that said it? A Yes.

Q Did you hear sounds as of the meat cleaver striking Thompson's head? A Sir, I didn't see them, I didn't notice that sound. There was so much excitement there in a second, you know.

Q Did you see Thompson make any efforts to either protect himself or to hit anybody there? A No, sir. Thompson put up his hands, and said he was killed.

Q He said he was killed? A Yes.

Q You saw that, you heard that? A Yes, sir.

(28) Q And you picked Thompson up? A Me and others.

Q What others? A There was Bill Schopf, and Pettiway, and another fellow came out of the forecastle on that deck, also; a colored boy, the saloon messman, came out. And we carried him into my forecastle. After carrying him in, on the floor, I left him with these fellows, and I made a dash to go up to the bridge. I wanted to notify the old man, or the mate on watch, that this guy was going around with a meat axe, you know, and on the way up forward--you know how you go over the catwalk on a tanker to the bridge--I

saw Medina walking up towards the bridge and he had a meat cleaver in his hands. So, I just reported right in, on the main deck, to the purser, to get the purser to go back aft to attend to Thompson.

Q Did you see Thompson thereafter? A Yes, sir. I went back with the purser.

Q Where was Thompson? A In my forecastle.

Q And was the light lit? A Yes, sir; in my forecastle, yes.

Q And could you see him plainly? A Yes, sir.

(29) Q Will you describe what you saw? A There was three big gashes in the side of his head.

Q What side? A Let's see now. (Pause) The right side of his head.

Q How far apart were these gashes, and where were they? A They were on the side, towards the back. The distance between the three of them wasn't a great distance; maybe four inches at the most, between the three gashes in his head.

Q Let me ask you this: When you went past that corner where Thompson was struck or assaulted, did you see anybody there? A No, sir; I didn't see Medina there.

Q Did you brush up against anybody there? A No, sir.

Q Was there a door near that corner? A Yes, sir, there was.

Q What door was it? A The door to the saloon messman's forecastle.

Q Who roomed there? A The galley utility, and the saloon messman were in that room.

Q Do you know whether that door was opened when (30) you passed it? A No, sir, it wasn't open.

Q You know it wasn't? A Yes, sir. There was no light whatsoever coming out; that's why I say it wasn't open.

Q But you didn't brush up against Medina? A No, sir, I didn't.

Q Or none of your senses told you that he was there? A No, sir, they didn't.

Q Did Thompson say anything to you from the time you left the pumpman's forecastle until he was struck? Did he say anything to you about coming to your forecastle? A No, sir, he didn't tell me he was coming there. He may have been going there, but he didn't tell me.

Q Did you see Medina thereafter? A (No response.)

Q Did you see Medina after that? A After the accident?

Q Yes. A The last time I saw him is when I saw him walking up to the bridge.

Q Did you see him after that? A Yes, sir, when he was in handcuffs, and different (31) things of that sort.

Q Was he put in irons? A Yes, sir, he was put in irons.

Q Immediately? A Yes, sir. I was one of the men that the captain asked to go up with him when he placed him in irons. And he instructed Medina at that time that he didn't want any violence

whatsoever. The captain--if you know him--he was only a short, little fellow; and he instructed him that he didn't want to have no trouble with him, that he had these men around. He brought up about twelve men with him.

Q Where was he put? A Outside the captain's quarters, on the port side of the deck. He was placed in hand and leg irons.

Q Was he placed in a chair, or where was he placed? A A cot was put outside for him, sir.

Q And did he stay there the remainder of the voyage at Corpus Christi? A The remainder of the voyage he remained there, yes.

Q And were people allowed to talk to him? A No, sir, nobody was supposed to associate with the man at all.

Q Were you there when he was taken off? (32) A Yes, sir, I was there when he was taken off.

Q By whom was he taken off? A He was taken off by shore authorities, and they brought him back to the forecastle to get his gear. We had already packed up his gear. The chief steward and I, as stewards' department delegate, were present.

Q Between the time of the assault on Thompson and the landing at Corpus Christi, was he allowed to go into the crewmen's mess for coffee or food? A No, sir, he wasn't allowed to move. His meals were brought up to him up there.

Q How long a time elapsed between the time of this assault, and the landing at Corpus Christi? A Approximately two days;

approximately 48 hours.

Q And in all that time he was chained to the bed, is that right? A Yes, sir.

Q Outside the captain's quarters? A Outside the captain's quarters.

Q Was a watch kept on him? A That is something I couldn't say definitely, sir.

Q You were not a member of the watch? A No, sir, I wasn't a member of the watch.

Q If there was a watch kept? (33) A I wasn't a member.

Q Will you tell us, again, under what circumstances he left the vessel? A He left the vessel in handcuffs, and he was taken ashore by the shore authorities.

Q What do you mean by "shore authorities"? A I couldn't tell you their exact rating, but I was under the impression that it was the F.B.I. that took him ashore.

Q When you saw Medina, after you heard this commotion, was he holding anything in his hand? A He was holding the meat cleaver.

Q Could you see that? A Yes, sir.

Q In what hand was he holding the meat cleaver? A Sir, I couldn't be exact on that.

Q When you saw Thompson on the deck there, after he was assaulted, was he unconscious? A He wasn't unconscious, but he didn't have his senses about him. He was what you would call

semiconscious; he was in a state of shock.

Q And was he talking sense? A All Thompson thought was that he was dying, or that he was dead at the time.

(34) Q Did you give any statements to any authorities in regard to what you saw? A I gave a statement to the chief purser on the ship. He copied them out, and turned them over to the authorities; and then, upon landing at Corpus Christi, they then went over all these statements.

Q Did you testify at any proceeding or trial? A No, sir, I didn't.

Q Did you give any further statements to any police official? A No, sir. The only statement, to the purser, which was gone over by the police officials in Corpus Christi, aboard the vessel.

Q Did you give any statement to the shipowner, or any of his agents? A No, sir. No written statements, or anything to that effect.

Q Was the statement that you gave to the purser in effect the same as you have told us? A Yes, sir, it was, with one addition in that statement. Previous to this assault, Medina had told me that he was going to kill Thompson.

Q That is what I was going to ask you about. A That's right. But that's in my statement that (35) I made.

Q That is what I was getting to.

When and where did you hear Medina say that he was going to kill Thompson? A That was the day previous.

Q The day previous to what? A To this accident.

Q Yes? A And it was in the forecastle, and it was approximately one to one-thirty in the afternoon. I was laying down, and Medina came up.

Q You were laying down in your forecastle? A Yes.

Q Was Medina in that forecastle, too? A Yes, sir, he lived in that forecastle. He wasn't laying down. He just came up, and was washing up; and he left right after that.

Q What did he say? A That he was going to get Thompson, that he was going to kill that so-and-so.

Q When you say "so-and-so", will you tell us what he said, if you can? A He was going to kill that "son-of-a-bitch"; that's what it was

Q Was this part of a conversation that you had with him? (36) A No, sir.

Q To whom did he say that? A To me. But I never encouraged conversation with Medina, or very few others on the ship, until I got to know them very well. He just came over, and was telling me that.

Q In regard to that, did you have an aversion to Medina? A An aversion? I couldn't say that, sir. I don't like homos myself, personally. The way I looked at it, if he keeps to his corner of the room and doesn't bother me, and has nothing to do with me, then I won't bother with him.

Q Will you explain to us why you don't like them? Why you

have that aversion to them, at least? A Well, I don't think they're normal people, personally. I don't think they're normal, and I can't see it, I just can't see their type of person.

MR. HANRAHAN: That's enough of that. We are not interested in his opinions on homosexuality.

MR. GLEASON: I am interested in his opinion on that in this matter, though.

MR. HANRAHAN: I will have to object to it.

(37) MR. GLEASON: I will take it.

BY MR. GLEASON:

Q Do you consider a homosexual an appropriate shipmate? A No, sir, I don't.

Q Will you explain why? A All right. From what I have seen of homosexuals ashore, they are continually making advances, and everything else; and they try, in every way, to get around you. I mean, by giving you gifts, and all that stuff. And that's stuff th. I can't see.

Q Do you know of your own knowledge, or have you heard, that Medina gave a gift, a valuable watch, to one of those with whom Thompson told you he was intimate? A No, sir, I do not know that.

Q Had you heard of any gifts he gave to anybody? A No, sir, I didn't. Although, when he was leaving the ship after the accident, I was there when the packing up of his goods was being made. And he had a big fur pussycat there. You know, one of these things

that you see, like a girl would have in her bed, or something. And he wanted to give me that, as (38) he was being taken off in chains, as a favor for packing up his goods.

Q When you packed up his goods, did you see anything else abnormal or out of the ordinary among his effects? A No, sir. Well, he had more toilet articles than you would find in any drugstore.

Q Did he have any perfume there? A All types of perfumes and bath salts; and all that type of stuff.

Q Were those perfumes men's perfumes or women's?

A I couldn't tell you; either one.

Q You don't know, do you? A No, sir.

Q Seamen or personnel aboard a vessel aren't given to using any kind of perfume, are they? A No, sir, they are not.

Q Are they given to using bath salts? A There is no possible way. How can you use bubble bath salts, or something like that, on the ship? You only have showers.

Q What else out of the ordinary did you notice among his effects? A That's all, sir.

(39) Q You were his room mate? A Yes, sir.

Q Then I will ask you this: Did you, during the course of your rooming with him before this assault--that is, in the few months that you were with him, a month or two and a half months--did he have these articles out there, in view? A No, sir, they were in his locker. But, when he would go to take a shower, or when he would go to take a shave, that was, maybe, a three-hour deal for him, like

I mean, it wasn't like a normal person, like you go in there for half an hour, and you're finished with it. With Medina, it was a great to-do with him, you know.

Q About his dress, did you notice anything out of the ordinary in regard to his dress? A No, sir, he didn't dress out of the ordinary at all.

Q You have already testified that his speech was definitely effeminate? A Yes, sir.

Q And did you smell this cologne on him? A Oh, yes; he always had it on him.

Q Did he use lipstick? (40) A No, sir, not to my knowledge.

Q Did he use anything else that was effeminate? A No, sir; I have not seen him with any of that on him.

Q Did the officers of the ship make regular inspections during the time that you were aboard? A They did, sir. They made inspections regularly on Saturday, but not of the lockers.

Q Why, were the lockers locked? A The lockers were locked, yes, sir.

Q Was there anything in regard to this man's bed or the outside of his locker, or anything like that, besides his person, that would bring to the attention of the officers the fact that he was a queer? A No, sir, there was not.

Q But you think that, definitely, anybody would know he was a queer, to see him walk? A Yes, sir.

Q Or to hear him talk? A Yes, sir.

Q Will you describe, so that a judge and a jury here may know will you describe that? And don't be afraid to differentiate, or to tell us wherein it was different from yourself, or myself, (41) or Mr. Hanrahan, or anybody that you would classify as normal.

A Well, he walked more like a chorus girl. It was all bumps, and, you know, the swivel of the hips when they walk. His motions were not the regular motions of a regular man when he walks along, with his arms at his sides, but he was always rolling at the arms, when he did it.

Q Was there a feminine expression on his face? A No, sir, not on his face.

Q And you think that his voice would imply to anybody the fact that he was effeminate? A Yes, sir.

MR. GLEASON: I think that's all.

CROSS-EXAMINATION BY MR. HANRAHAN:

* * *

(Page 44, lines 22 to 24)

Q Did you ever see any evidence that might lead you to believe that Thompson was riding Medina? A No, sir, I didn't.

* * *

(Page 48, lines 4 to 20)

Q Did he ask what could be done about getting Schopf or Pettiway off the ship? A No, sir, he didn't. He only wanted to get rid of Medina. The way he looked at it, Medina was the cause of all

that trouble that was there, of that type.

Q There was no report made concerning the other two men? A Not concerning the other two men, no, sir. (Pause) Although, the other two men were warned by the Coast Guard in Corpus Christi when we came in.

Q They were what? A They were warned by the Coast Guard that if they were associated at any time again with anything like that, their papers would be lifted.

Q Did you actually know that? A Yes, sir; I was there when the Coast Guard told them that.

* * *

(Page 50, lines 3 to 20)

Q When you were in your room, and you say that Medina made the threat to kill Thompson, would you say that was before or after Thompson is supposed to have found him having the affair? A To the best of my knowledge, I would say that was before.

Q Didn't it surprise you, didn't it indicate anything to you, that, all of a sudden, this man should threaten another man? A It did, but he used to have trouble with Thompson in giving his orders aboard the ship. He was a waiter, and he used to take the crew's orders and, particularly in the mornings-- like on his orders, he would get the orders mixed up, and stuff like that. I mean, he didn't go for that.

Q Do you know anything about Thompson, supposedly, threatening Medina? A No, sir, I never heard anything to that effect.

* * *

(Page 51, line 16 to Page 52, line 1)

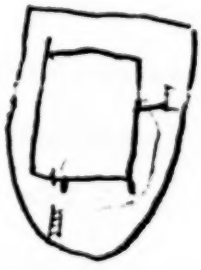
Q To your knowledge, did Thompson report this alleged affair to other people besides yourself? A No. That's something I couldn't say, only to the delegates.

Q What I am trying to get at in our own language is, did he seem to be making a big to-do about this? A No, sir, he wasn't. It didn't go all over the ship, I know that. It was to the delegates, like, that he (52) brought it to their attention.

* * *

Diagram drawn by Wit. Caplis to show boat deck on after end of ship, marked Exhibit P-1 id. upon taking of deposition.

P(1)-id
1/11/53



UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WILLIAM THOMPSON, :
Plaintiff, :
:
-against- : Civ. 1164-52
:
COASTAL OIL COMPANY, :
Defendant. :

Deposition of MATHIAS SCHIFFER taken at the office of Silas B. Axtell, Esq., 15 Moore Street, New York, N.Y., on January 20, 1954, at 2:30 o'clock p.m., pursuant to notice.

Appearances:

SILAS B. AXTELL, ESQ.,
(Silas B. Axtell, Esq. and
John A. Gleason, Esq.)
Attorney for Plaintiff.

FRANCIS M. McINERNY, ESQ.,
Attorney for Defendant,
BY: MESSRS. HANRAHAN & BRENNAN,
(Michael A. Hanrahan, Esq.)

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(Page 2, line 1 to Page 16, line 7)

IT IS STIPULATED AND AGREED by and between the respective parties that signing, sealing, filing and certification are waived; all objections, except as to the form of the question, are reserved to the time of the trial.

MATHIAS SCHIFFER, having been first duly sworn by the Notary Public herein, testified as follows:

DIRECT EXAMINATION BY MR. GLEASON:

Q Mr. Schiffer, what is your name and address?

A Mathias Schiffer, 87 Park Place, Passaic, New Jersey.

Q What is your telephone number? A Prescott 8-6701.

Q Were you chief steward on the Rosina Marron? A Yes, sir.

Q In January, 1950? A Yes, sir.

Q How long had you served, before that, on the Rosina Marron?

A I think it was about two or three years, I think. (3) I got my discharges home.

Q What were your duties as chief steward? A I was head of the steward's department.

Q In other words, you supervised the cooking and the serving of food, is that right? A That's right.

Q Did you also, Mr. Schiffer, have the responsibility of taking care of the men who were actually doing the work, such as cooking and serving meals? A That is right.

Q Was one of your responsibilities to keep them in line, so to speak, and see to it that they did their duties? A Right.

Q And was it also one of your responsibilities, if you found anything wrong with any member of the crew, to take notice of that, and to report it to the captain? A That's right.

Q You are pretty close, on shipboard--and especially on a ship like the Rosina Marron--to the men who work under you, aren't you?

A Right.

Q And when you are out on the high seas, they (4) come under your supervision pretty much every hour of the day, isn't that right, sir? A That's right.

Q How many men were on board, the total personnel aboard the Rosina Marron? A 41.

Q Do you know the approximate size of the ship?

A I think she was about 11,000 tons, I think.

Q How many men did you have under your supervision?

A Eight; seven, including me, that's eight.

Q What were their ratings? A Chief cook, second cook, galleyman, saloon mess, crew mess, pantry utility, and B.R. utility.

Q Did you know William Thompson? A I certainly did.

Q Do you remember when he signed on the vessel?

A I don't.

Q Was he there when you signed on? A No.

Q Approximately how many months before January, 1950, did he serve, do you remember? A It could be four or five months; I'm not sure, but it could be that time.

(5) Q Was he a good worker? A He was a good worker.

Q Was he a pleasant man? A Very pleasant.

Q To your knowledge, did he get along with his crew members, his fellow crew members? A Yes, sir.

Q Did he get along with you? A Yes, sir.

Q Was he pleasant with you? A Yes, sir.

Q Did he obey orders? A Yes, sir.

Q Did you know Mario Medina? A I did.

Q Do you know, or do you remember, when Mario Medina signed on board the vessel? A I don't know the exact time, but it would be around the same three or four months; I am not sure about it.

Q By the way, did I ask you what William Thompson's rating was? A He was second cook.

Q I will ask you, then, what was Medina's rating?

(6) A Crew mess.

Q To refresh your memory, Mr. Schiffer, Mr. Thompson was assaulted by Mr. Medina on or about January 15, is that true?

A The 13th.

Q The 13th? A Yes.

Q All right, sir. A On a Friday.

Q I am merely mentioning that to refresh your memory, and I want to know, before that date, had you noticed anything particularly odd about Medina? A I did.

Q When did it first come to your attention that Medina was not normal? A Long before that.

MR. HANRAHAN: Off the record.

(Discussion off the record.)

Q I will word the question this way: When did you first observe anything about Medina? A When he was kissing two members of the crew, right on the table.

Q And what table was that? A The deck department table.

Q Where was that table located, and what was (7) it used for?
A The first one as you come in, on the port side.
Q Do you mean in the mess hall? A In the mess hall, yes. The first one is the deck; and the second, for the engine department.
Q In other words, you have tables reserved to the different departments on the ship, is that right? A Yes.
Q And as you came in the door, where did you enter?
A The port side.
Q And as you entered the crew mess hall from the port side, the first table that you came to was reserved to the deck department, is that right? A Yes.
Q What were Medina's duties? A As a messman, to serve the whole gang, the deck and the engine department.
Q Was one of his duties to go about that deck department table, and distribute food, and take plates away, and everything like that?
A Everything.
Q Approximately when, for the first time, did you observe Medina kissing members of the deck (8) department seated at that table? A Well, in fact he was kissing two.
Q When was the first time that you observed that, sir?
A I say about two months before this happened, I am not sure; but that's the way I figure it, about two months. It's quite a few years passed by, you know.
Q How soon after Medina came on the ship was that? Maybe

that would help you? A After two months. I think he was on there four or five months; I am not sure about it.

Q And after he was on there that time, you observed him kissing members of the deck crew? A Just two.

Q Was he kissing them on the mouth? A That's right.

Q While they were seated at the table, right? A Yes.

Q When you observed that, did you report that? A I did not.

Q You reported that to nobody, is that right? A No.

Q Was there anything else odd or unusual about Medina that you observed from then on, or before that? (9) A Well, I knew exactly, that he was that way.

Q What do you mean by "that way"? A I mean, be queer.

Q Queer? A Yes.

Q Now, I am going to ask you what you mean by "queer." I want you to tell us exactly, and don't spare words. A I mean the way he acts, and his movements, and so on.

Q You say the way he acted? What do you mean? Tell us what you mean, without prompting you. A With his hands, this way (indicating).

MR. GLEASON: The witness makes an effeminate gesture.

Q Are you talking about effeminate gestures, and an effeminate way of walking? A That's right.

Q Wagging of the hands, and so forth and so on? A Right.

Q When for the first time did you observe that? A I will

tell you, I observed that the minute he came on the ship.

Q Did you do anything about that, Mr. Schiffer? A I did not.

Q Did you talk to him about it? (10) A No.

Q Did you talk to him about it when you saw him kissing these two men? A Well, I mentioned it. I said to him, I said -- he used to wear a cross around his neck, you know; a chain and a cross.

Q Do you mean a crucifix? A A crucifix, yes. So I said to him, I said, "You should be ashamed of yourself. You're supposed to be a good Catholic."

So he said, "Religion got nothing to do with it."

That's what he said.

Q Did you observe that he painted his cheeks at all, or painted his lips? A No.

MR. HANRAHAN: Please, don't lead him.

MR. GLEASON: All right.

THE WITNESS: I came here, you know--I came here to tell the truth.

MR. HANRAHAN: I move to strike that out as not responsive.

MR. GLEASON: Off the record.

(Discussion off the record.)

(11) Q You never saw any paint on his lips or cheeks, or anything like that? A No.

Q What else did you see about this man which seemed unusual

or queer to you? A I mean, the way he acted, you know; in his movements.

Q Did anybody say anything to you about him before this date? A Well, everybody knowed it.

Q How do you know that everybody knew it? Did you overhear them talking about him? A They just called him Rosina.

Q Did they call him anything else? A Just Rosina.

Q Mr. Schiffer, you knew, during the course of this time, from the time that you saw him kissing the crew men there at the deck table, that this man was a sexual pervert, didn't you?

MR. HANRAHAN: Objection.

A I think I did. Although--otherwise, he wouldn't do it in the open.

Q Now, can you tell us the names of the men he was kissing? A Well, I know that--what's his name there?-- (12) was an ordinary seaman, and another one--

Q Was one of them Pettiway? A Yes.

Q And the other? A (No response.)

Q Schopf? A It could be.

Q Will you take a look at the crew list? You might find it there (handing to witness). A I'm not sure about it. I know it was two there.

Q Do you know that one was Pettiway? A I know one was Pettiway.

Q But you are not sure of the other, is that right? A No. Pettiway was his regular girl friend, I suppose.

Q Who called him Rosina? Who did you hear call him Rosina? A Most of the crew.

Q Well, when you talk of most of the crew-- A (Continuing) Even the officers called him Rosina.

Q That is what I want to know. Was there any other feminine name that he was called by? A No; just Rosina.

Q Did you ever hear him called Susie? A No.

(13) Q Did you ever hear any of the officers call him Rosina? A Well, I wouldn't say that, but he mentioned to me, how Rosina was?

Q In other words, at least one of the officers asked you how Rosina was? A That's right.

Q Who was that? A The second mate and the captain.

Q What was the name of the second mate? A Thomas. I think he comes from Texas.

Q And you say that you heard the captain ask for Rosina? A Yes, that's right.

Q And he meant Medina? A That's right.

Q Do you know of your own knowledge that the captain, during this time, knew of the queerness of this man? A Oh, yes.

Q You know that? A Yes, sir.

Q How do you know it? A Otherwise, he wouldn't call him Rosina. To my opinion, he wouldn't.

(14) Q Were any reports made to you regarding the third mate? A At first, but I don't know who told me. That A.B., he was

transferred from A.B. to third mate.

Q When was that? A I don't know the time. He was one man short, and he had the license, and they made him third mate.

Q Was that before the assault on Thompson? A Yes.

Q How many months before, or how many weeks? A I wouldn't know the correct time; it might be a month. This was on a seven-months trip.

Q When was the report made to you in regard to the third mate and Medina? A Who?

Q Was any report made to you, or did anybody tell you anything in regard to them? A To the third mate?

Q A report was made to the third mate? A No. The third mate, somebody told me that he was queer. In fact, I noticed that, too.

Q You noticed that he was queer? A Yes.

Q In what way was he queer? (15) A He acted the same way, but he was a quiet one; he just was by himself.

Q At any time, from the time that you first saw Medina kissing these crew men, and you heard him addressed as, or called, Rosina, did you ever go to the captain or any of your superior officers on that ship, and talk to him or them about it? A I did not.

Q Who are your superior officers aboard a ship? A The captain.

Q That is the only one? A That's the only one, the captain.

Q But you have a superior officer ashore, have you?

A Yes.

Q Who is that? A The port steward.

Q During those months, those months that Medina was aboard there, did you have occasion to write to the port steward, or cable him, for any reason whatsoever? A I could have.

Q When you say "could have", under what conditions could you have, and when? A I could have written him, I could have talked to (16) him. We made coastwise trips before we went on the long trip.

Q What ports did you hit? A I forget now. I think we went to France, but I am not sure about it. But that can be checked on the voyages for 1948 and 1949, and so on; it could be checked.

* * *

(Page 17, line 21 to Page 39, line 22)

Q You say that Thompson was assaulted by Medina on the 13th of January, is that right? A That's right, on a Friday.

Q In 1950? A That's right.

(18) Q And that was a Friday, you say? A That's right.

Q Prior to that day, was a report made to you by Thompson in regard to something he saw? A That morning, on the 13th, he reported to me that he caught him, and, I think it was Pettiway.

Q That he caught them, you say? A Caught them going down--I mean, putting it up.

Q Will you tell us exactly what the report was that was made

to you, and how many men did he say were involved in this thing that he caught? A He didn't mention how many at all. He said he seen him with Pettiway.

Q Pettiway? A I think it was Pettiway.

Q And what was he doing with Pettiway? A Well, as much as he told me, he was putting it up.

Q What did you understand from that, Mr. Schiffer?

A Well, I mean, between us, I suppose he put it up in his ass.

Q Did he say anything about anything else? Any other abnormal acts? A No. Just told me he wanted me to report it to the captain.

And he says, "If not, I'm going to report it (19) myself."

I says, "Well, it's my duty to report it to the captain."

Q What time was this on the 13th? A Around 5:30, before 6:15. They start to work at 6:15; that's the time they start to work.

Q Did he tell you when he caught these men in this act?

A He just mentioned, "Last night," that's what he said.

Q Did he say what time, or anything about that?

A No, he didn't tell the time.

Q Did he tell you under what conditions, where it was that he caught them? A Down in the forecastle.

Q In whose forecastle? A Pettiway's forecastle.

Q Did he tell you what he was doing in Pettiway's forecastle?

A He was putting it up his ass; that's what he told me.

Q Who was? A (No response.)

Q Let's have this in detail, Mr. Schiffer. Call a spade a spade here because, after all, if we are going to bring this thing out in the testimony, we might as well bring it out like men.

(20) A That's right.

Q What did he tell you? A He said to me that Medina put it up Pettiway's ass.

Q Now, did Thompson tell you what he was doing? A Thompson told me that.

Q Look, Thompson caught them? A Caught them.

Q In Pettiway's forecastle? A Yes.

Q Thompson didn't sleep in Pettiway's forecastle, did he? A No.

Q Did he tell you what he was doing there? A No, I don't know why he was down there. I suppose he went down there trying to catch them, or what. That's what I think.

Q All right. Now, when he told you that, Mr. Schiffer, what did you do? A We was just off the coast of Florida, and the captain was on the bridge. So I figured, myself, I said I might as well wait till we are off the coast of Florida, so I can talk to the captain.

And I went up there about seven--I think around that time, just before breakfast time--and (21) I spoke to the captain, Joe Hansen, and I told him what happened. He said Medina reported that to him, himself--to the captain.

Q You mean Medina reported it to the captain?

MR. HANRAHAN: When you reported to the captain, he told you that Medina had already been up there himself, is that it?

THE WITNESS: That's right.

Q Did the captain tell you that he already knew that Medina and Pettiway had been caught in an unnatural act? A Well, he didn't--the captain didn't say that. He just told me that Medina reported to him already. Not an act, he just told me that he reported the case to him.

Q Did the captain tell you what Medina told him? A He did not, no.

Q Did he in any way tell you what Medina had talked to him about, or anything like that? A No, he didn't.

Q He just said that Medina reported to him, is that right? A That's right.

Q Did the captain give you any instructions (22) about what to do about Medina? A No. He said he was going to take care of it.

Q He was going to take care of it himself? A Yes.

Q He didn't say he had taken care of it, did he? A No; he was going to take care of it.

Q Did he tell you how he was going to take care of it? A Well, I suppose he wired the sheriff down in Corpus Christi, to come on the ship.

Q Mr. Schiffer, had the captain sent for Medina? A No. He went up himself.

Q What time did he go up, do you know? A He must have went up about six o'clock.

Q That morning? A Yes. See, I wouldn't go up, because we was on the coast. I didn't want to bother the captain while we were on the coast.

Q Did you talk to Medina before he went up to the captain? A No.

Q Did you see anybody talk to Medina before he went up to the captain? A That I don't know.

Q Was anything done with Medina during that day, (23) from six o'clock in the morning until the evening time? A It was not. They was going to straighten it out, between the ship's committee and the delegates.

Q Were you given any orders by the captain to do anything about Medina, to relieve him of his duties? A No.

Q Or to put him--to lock him up, or anything like that? A I can't do that anyway.

Q You know of your own knowledge that the captain can do that to a member of the crew, don't you? A Of course; he's the law on the ship, about.

Q But Medina's actions were not, you say, hampered in any way; or was he, in any way deprived of any of his liberties, is that right? A He wasn't deprived of nothing.

Q Was he taken away from his work at all? A No.

Q Did you know that there was a union meeting? A They

called a union meeting about 6:15, something like that; I think 6:00, or 6:15. No, not a union meeting, just the steward's delegate, the deck delegate, the engine delegate, and the ship's chairman.

Q Mr. Schiffer, do you regard sexual perverts (24) as being dangerous?

MR. HANRAHAN: Objection.

A I think it is. I mean, I'm just thinking of it this way: if there's anything that comes between them, they might get jealous, or something, jealous about--because he's going to take his girl away from him. That's what I think.

Q Now, have you had quite a bit of experience with sexual perverts? A I had plenty on the ships.

Q On ships? A Plenty on the ships.

Q And your opinion, that you have just expressed, is based on what you have seen of these perverts? A Yes. I think, myself, they shouldn't be on a ship. But, if the crew don't squawk, I can't say nothing. They should be reported to the union or to the Coast Guard, and let them take the papers away. That's what I think.

Q Do you think that sexual perverts are fit shipping mates for the shipping line to put on a ship? A No, they should not be put on a ship.

Q For the reasons that you have given, is that right?

A That's right.

(25) Q Are there any other reasons that you would like to give why

they shouldn't? A No.

Q You consider them dangerous? A That's right.

MR. HANRAHAN: I object to this line of questioning.

Q And a menace to the health and well being and life of the crew members, is that right, sir? A Yes.

Q Do you know whether there were any rules promulgated by this company, or the ship, in regard to these sexual perverts? A No.

Q None at all? A No.

Q Were any rules promulgated? A Any rules?

Q Rules, yes. Do you know what I mean by "rules"? A Yes. There was no rule, no.

Q You didn't go to this union meeting, did you? A I couldn't go there because I--there was only four men there; three delegates and the ship's chairman.

Q Did you know that there was going to be a (26) union meeting? A Oh, yes.

Q Did you know that Thompson was going to be there? A Well, he had to be there.

Q To make the complaint? A Yes.

Q Who else was going to be there that you knew? A Rosina -- Medina.

Q Who else? A The deck delegate, the steward's delegate, the engine delegate, and the ship's chairman.

Q Who were they, do you remember? A The ship's

chairman was the chief pumpman, James Young. I don't know who was the engine delegate.

Q What was his Z number on the articles? A The pumpman's? Z427975.

Q What is his number on the list? A 23.

MR. GLEASON: I think I will now offer this crew list for identification at this time.

(Crew list indicated was marked Plaintiff's Exhibit 1 for identification.)

BY MR. GLEASON:

Q Will you take this list, and tell us who the (27) others were? A I don't know their names. That all could be checked through the union, because the minutes go in through the union.

Q Do you mean the minutes of this meeting they had? A That's right. They are supposed to be in there.

Q Do you know how long this meeting lasted? A Well figure about an hour, because I think the accident happened at about 7:30.

Q You don't call that an accident? It wasn't an accident, to be hit three times with a meat cleaver? Do you think that was an accident? A I don't know.

MR. HANRAHAN: Objection.

Q Did you know that Medina had left the meeting early? A I seen him coming down with his shirt over his arm, and he went in the pantry, and I figured he was going to wash his shirt.

Q What did he do? A Then he went to the cook's room to get the key for the galley. I closed up at six o'clock, that galley.

Q You close the galley up every night at six (28) o'clock, is that right? A Six, 6:10.

Q The meat cleavers are down in the galley, is that right, sir? A Yes.

Q And other sharp knives and instruments are there, too, is that right? A Right.

Q Is that one reason that you lock it up? A That's right.

Q Did he ask you for the keys, or did you see him get the keys? A I didn't see him get the keys.

Q How do you know he got them? A Because the cooks weren't there, they weren't in their room. So he went in the room, and he got the keys, opened up the galley, and got the cleaver out, and put it in his shirt. That's what I figured on, the next day.

Q What kind of a cleaver was it? A The small cleaver.

Q Did you see the cleaver? A Yes.

Q You saw it after he hit Thompson with it, is (29) that right? A Yes.

Q Will you describe that cleaver to us? A That's, I think, about five inches.

Q Let's make a drawing of that cleaver. Could you make a rough drawing of the cleaver for us? (Handing witness pad of yellow foolscap.)

(Witness makes marks.)

MR. GLEASON: I have reporter's transcript of testimony, United States District Court for the Southern District of Texas, Corpus Christi Division, No. 3585, United States of America against Mario Medina.

That was supplied to Mr. Axtell by you, was it not, Mr. Hanrahan?

MR. HANRAHAN: Right.

MR. GLEASON: And you have read it, have you?

MR. HANRAHAN: Yes.

MR. GLEASON: I will offer that for identification.

(The document referred to was marked Plaintiff's Exhibit 2 for identification.)

MR. GLEASON: Off the record.

(Discussion off the record.)

(30) BY MR. GLEASON:

Q Mr. Schiffer, when was the first time you knew that Thomson had been assaulted? A Well, the captain came down to me, I think it was about--it could be about eight o'clock that night--and I was sitting in my room, I was reading, listening to the radio. Captain Joe Hansen came down, all pale, and he said, "Steward, you better come along with me."

I said, "What's the matter now?"

He said, "Rosina just hit the second cook with the cleaver."

So I said, "Well, I got to go there anyway, because I got to take his job over."

So, he was sitting up in the messmen's room. We bandaged him up, till he was in the hospital.

Q Did you go up and see him? A I helped bandage him up there with sheets.

Q Where was he when you first saw him? Was he on the deck, or where was he? A In the messmen's room.

Q You mean, from the deck, they had taken him? A Yes.

Q Did you see the deck where he was hit? (31) A No, I did not.

Q Afterwards did you see it? A I know where it happened; they told me where it happened.

Q Did you see any blood there? A No, I did not look for any.

Q When was it, for the first time, that you saw that deck? A Well, when I went up there at eight o'clock at night.

Q It was dark up there, wasn't it? A Yes.

Q There were no lights around there, were there? A They got a very--I think one light on each side.

Q Did anybody point out to you where he was when he was hit? A No.

Q Where, on the deck? A No.

Q Did you know where it was? A I knew where it was.

Q Will you describe where it was? A It was aft, going aft from the poop deck on the port side; port side aft, going up from the poop deck.

(32) Q Are you sure it was port side? A Yes. In fact, that's the only stairway going up there.

Q Will you draw in, with a pencil, where the poop deck is, and show where it was that you understood that he was hit?

A That is the poop deck, and here's the ladder, going up there (indicating).

Q Where was he hit? A He was hit up here, on deck, up on the upper deck, going up the stairs (indicating). Medina was waiting for him here (indicating). This is the poop deck (indicating). This is the stairs going up to the boat deck. The meeting was over here, on this side, around here (indicating). That's the pumpman's room, here (indicating).

Q That is on the starboard side? A That is on the starboard side, yes. Then, Medina went down to get the cleaver, and was waiting here (indicating) for him, till he came out.

Q Will you indicate the pumpman's room with a P?

(The witness indicates on paper).

Q And you have already marked, with a cross, (33) where it was that it happened? A Yes.

Q Were you shown the cleaver that he was hit with?

A (Witness indicates on the paper.)

Q You are also pointing there, to a picture of the cleaver, is that right? A drawing you made of a cleaver? A Right.

Q And that was that cleaver, what it looked like? A Yes.

Q Will you just put a C near that? A (Witness complies.)

Q That cleaver was about five inches long, you say? A Five inches, here (indicating); it don't account for the handle.

Q With the blade and the handle, how long was it? A It could be nine inches.

Q How heavy was it; how much did it weigh? A I would say about two, two and a half pounds.

Q Was it sharp? A Yes.

Q On one side or both sides? A One side.

(34) Q What was this cleaver used for in the galley? A To sharpen the meat up.

Q Did you say chopping the meat up? A Yes; pork chops or lamb chops.

Q Also for chopping the bones between the chops? A Yes.

Q You know, when you chop a loin of pork or a lamb, you get bones between the chops, is that right? A That's right.

Q And when you cut steaks, you have to chop the bone, is that right? A No.

Q You do in chops, don't you? A Chops you do, yes.

Q Was that cleaver the one that was used for that? A That's right.

Q When you saw Thompson, will you describe him to us? What you saw about his head and his body? A Well, I can't describe how many hits he had. It was all full of blood, see? It took about two sheets to cover him up, before we got him down to the hospital. That's as much as I know. He had three or four or

five in there-- I don't know.

(35) Q Three or four or five sheets on his head? A No, hits.

Q Cuts? A Cuts, yes.

Q Did you see those cuts? A I did not.

Q Did you look at them? A No.

Q And you say that there was lots of blood around there? A Yes.

Q How much blood would you say that you saw come out of Thompson? A We put two sheets around him to cover him up. I would say about--I am not so perfect in mathematicals--I would say about a quart or two, or--something like that.

Q Was he unconscious when you saw him? A No.

Q Was he talking to you? A He wasn't talking, no; but he wasn't unconscious.

Q How do you know that? A Well, he had his eyes open.

Q That's all? A Yes.

Q But he wasn't talking to anybody? (36) A No.

Q He wasn't saying anything? A No.

Q Was he answering any questions? A No.

Q He was stunned, was he? A I suppose so.

Q Under shock? A Most likely. Anybody gets hit three or four times over the head, I think he would get stunned.

Q He was badly hit, was he? A Yes.

MR. HANRAHAN: Objection.

Q What did you do with him? A Put him in the hospital.

and the next day, I think we arrived in Corpus Christi, and the captain phoned up for the Coast Guard--I think it was the Coast Guard--and the sheriff--and when we docked, the whole place was down on the dock, about fifty of them, with tear gas, pumps and everything. They just hollered up there, if there was any mutiny on the ship.

Q Do you know what happened to Medina? A You mean after we docked?

Q No. After he hit Thompson with the cleaver.

(37) A The old man put him in irons on the port side, next to the boats. That's rules and regulations, in case anything happens to the ship, so he is near the boat.

Q Where was that, outside the captain's quarters?

A That's right.

Q And when you say he was put in irons, what do you mean by that? Will you describe it? A He was just chained on one leg, I think just one leg, onto the rail going up to the bridge, to the stairs going up to the bridge.

Q Were his hands also chained? A No.

Q Just his legs? A Just his legs.

Q He was chained to the rail of the ship? A No; to the rail of the stairs.

Q With what? A With the leg band.

Q And a chain? A Yes.

Q And a lock? A Yes. One of these handcuffs.

Q Handcuffs? A Handcuffs with a chain on there for the

legs? I don't know.

Q You tell us, sir, because you were there (38) and we weren't, will you? A Yes.

Q I show you an ankle band with a chain on it (indicating). Was that what it was? A That must be it.

Q Is that what was done? A Yes.

MR. GLEASON: I will offer this for identification.

Did it look approximately like that, sir?

THE WITNESS: That's right.

(The item referred to was marked Plaintiff's Exhibit 3 for identification.)

Q Was he kept in that way, that is, chained to the stair rail, all the time until the ship docked at Corpus Christi? A Yes, sir.

Q And was he put in those chains directly after this assault on Thompson? A When he reported to the captain, he put him in that.

Q And then, when the vessel docked at Corpus Christi, what was done with him? A When the sheriff came on, they took him down there, and put him in handcuffs, brought a man to the (39) captain's room, and they questioned him there.

Q And then what did they do, take him away? A Oh, yes.

Q Did you attend his trial? A No.

Q And you didn't testify there either, did you? A No.

Q What was done with Mr. Thompson? A He was taken

over there, and put in the hospital in Corpus Christi. How much I heard, he was transferred to New Orleans, or somewhere; and from New Orleans, transferred--I had a couple of letters from him--from there over here to Staten Island, I think. That's all I know.

Q Have you seen him since? A No.

Q You haven't heard from him; you haven't laid eyes on him? A No.

Q You haven't talked to him? A No.

MR. GLEASON: I think that is all.

* * *

(Page 51, line 6 to Page 55, line 4)

REDIRECT EXAMINATION BY MR. GLEASON:

Q You have heard of this, though? A Yes.

Q And it came to your attention, forcibly, that these queers could be dangerous, is that right, sir? A Well, I figure on this, if they get jealous, that maybe the other girl friend wants to take him away from him, and so on--that is, very jealous--jealousy comes in, I suppose.

Q In other words, there is always the chance, when one of these perverts is aboard a ship, that something will break out in violence, is that right, sir? A I think so. I wouldn't say yes, but it could be.

Q As a matter of fact, you heard, did you not, that one of them threatened your life? A That's right.

Q And that brought it forcibly to your attention, then, that they

could be bad actors, is that (52) right, sir? A That's right.

Q You have been working for Sieling & Jarvis for many years, have you not? A Yes.

Q And they own the Coastal Oil Company, the defendant here, is that right, sir? A Well, they were the agent for them.

Q You are still working for the Coastal Oil Company, are you not, sir? A No, I work for Sieling & Jarvis.

Q You still work for Sieling & Jarvis, is that right, sir? A Yes.

Q And you were subpoenaed to come here, were you? A Yes.

Q And you are planning on going to Mobile, to ship out, is that right, sir? A Yes.

Q What ship are you planning to go on? A On the Antelope.

Q And who operates that vessel? A Sieling & Jarvis.

Q You went to Mr. Hanrahan's office in regard (53) to this case, did you not? A Yes.

Q And you gave them a report in regard to it, did you? You told them all about it? A Yes.

Q And did you speak to Mr. Hanrahan? A Yes.

Q Did you sign a statement? A No.

Q Did they ask you to sign a statement? A No.

Q Did they subpoena you, at any time, to appear? A No.

Q What was the exact color of Medina? A (No response.)

Q That is, comparing him with Thompson, is he a lighter color? A Oh, yes. You mean lighter?

Q Thompson is a dark man, is he not? A Not too dark, but I mean he's a negro all right, but he ain't too dark.

Q Now, Medina is more on the idea of being light colored, isn't he? A Yes.

Q As to Medina's physical stature, his physical make-up, would he impress you as being a man who could, if he wanted to, cause a lot of bodily harm to somebody? A Oh, yes.

Q He was strong, was he? A Yes.

Q And big? A Yes.

Q Would you describe this fellow Pettiway for us? A He was just a little bit of a fellow. He is about--I would say about five-six or five-seven. He weights about 160 pounds, if he weights that much. I don't think he weighed that much.

Q Would you describe Schopf for us? A I couldn't. If I seen him, I would describe him all right. But I think he was the A.B.

Q Yes. He is No. 14 on the crew's list, is he not? A Schopf? Well, yes. William F. Schopf, yes.

Q What is his Z number? A His Z number is 112895.

Q During these years that you worked for Sieling & Jarvis on their ships, you say you came across, or that you saw on their ships, from time to time, these queers? (55) A Yes.

Q Did you ever report any of them to Sieling & Jarvis? A No.

* * *

Crew List of Rosina Marron
Marked Exhibit P-1 id. upon taking of
deposition of Mathias Schiffer

69b

CREW LIST - 1949 except

United States Coast Guard

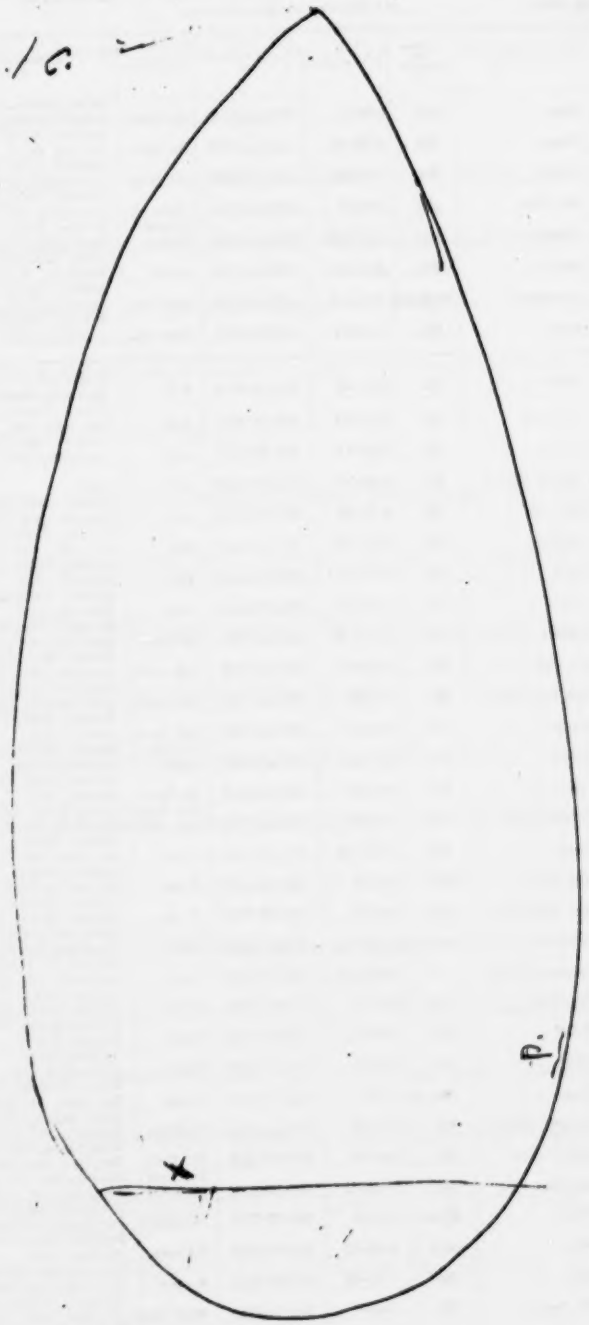
Upon departure of the American STEAMSHIP ROSINA MARRON
Official No. 243628, a TANKER, of NEWARK, NEW JERSEY
Owned and operated by SIELING & JANVIN CORP. of 74 TRINITY PLACE, NEW YORK, N.Y., of which THEO. [illegible] is master, on Voyage No. 17
of 320 East 20th Street, New York, N.Y.
bound from MARCUS HOOK, PENN., on DECEMBER 1, 1949
to ONE OR MORE GULF PORTS OR CARIBBEAN PORTS, the following compose the crew:

L. No.	NAME OF SEAMAN AND BOOK OR CERTIFICATE OF IDENTIFICATION NUMBER	BIRTHPLACE	CITIZEN OF WHAT COUNTRY	DATE OF BIRTH	SOCIAL SECURITY NO.	CAPACITY	NAME AND ADDRESS OF NEXT OF KIN
1	Alfred B. Tewksbury X1019319	Mass.	USA	9-9-14	099-14-9038	Ch. Mate	Wife, Alice, 65 Forbes Street East Hartford, Conn.
2	Thomas E. Cortese X333089	Texas	USA	7-29-16	453-14-1729	2nd Mate	Mother, Pearl Salado, Texas
3	Selwyn B. Stevens X56103 D-2	Calif.	USA	9-13-02	125-12-6798	3rd Mate	Mother, C. E. Fay, Box 277 Palm Springs, Calif.
4	Harold Shalit X621381	New York	USA	2-2-27	078-28-2144	Radio Op.	Father, Irving, 1702 E. 6 Street Brooklyn, New York
5	John E. Witherspoon X606935	Florida	USA	11-17-26	261-22-1728	Purser-Pharm.	Mother, Faye, 2225 S. W. 99th St. Miami, Florida
6	Eugene E. Huntington X362667	Maine	USA	12-11-11	026-16-0826	Bos'n	Wife, Catherine, 266 D Congress St Portland, Maine
7	Cornelio Fl Ruben X654797 S290754	Honduras	Honduras	9-15-19	438-32-3722	Deck Hd.	Mother, Anita V. De Pena Puerto Cortez, Honduras, C.A.
8	Sidney A. Walton X [illegible]	Maine	USA	7-13-25	002-12-6025	Deck Hd.	Mother, Alberta, 1 Cox St. Portland, Maine
9							
10	Charles L. Huntington X364798	Maine	USA	12-1-08	022-03-0242	A.B.	Mother, C. E. Penn, 133 Clark St. Portland, Maine
11	Chester Furoshi X600008	New York	USA	6-13-13	085-16-8113	A.B.	Father, Martin, 346 East 19th St. New York, N.Y.
12	Carlos E. Thomas X306399	B.W.I.	BWI	9-30-23	367-36-0122	A.B.	Sister, Isola Charles Trinidad, B.W.I.
13	Nils G. Larsen X114048	Sweden (Nat.)	USA	2-22-96	054-09-4256	A.B.	None
14	William F. Schopf X112895	New York	USA	8-24-25	060-22-0131	A.B.	Mother, Mary, 183 Roe Bridge Ln. East Meadow, Long Island, New York
15	Joseph Chow X56177	Hawaii	USA	12-24-26	576-18-1461	O.S.	Sister, Harriet, Cayuse, 345 E 17th St., New York, New York
16	Thomas H. Pittaway X613217	Mich	USA	6-11-27	376-24-1134	O.S.	Mother, Lottie, 8810 Ashton Avenue Detroit, Mich
17	Steven Prelog X476679	Mich.	USA	8-24-17	352-07-8472	O.S.	Mother, Barbara, 1912 Salem Avenue Detroit, Mich.
18	George P. Brown X397799	Canada (Nat.)	USA	11-21-17	139-14-7969	Ch. Engr.	Father, John, 84.71, Box 439 Purcellon, Saskatchewan
19	Joseph Cartiglione Jr. X376435	New York	USA	4-19-23	051-12-7288	1st Asst.	Mother, Mrs. Susan, 348 Clinton St Brooklyn, New York
20	John J. Standish Jr. 609980	England (Nat.)	USA	8-1-98	086-12-0134	2nd Asst.	Daughter, Isobel Fay, 146-11 220 St Springfield, Long Island, New York
21	John Puglia Jr. X672668	Penn.	USA	10-2-23	030-18-4351	3rd Asst. Jr. 3rd Asst.	Father, John, 531 Chestnut Street Girard, Penn.
22	Louis E. Constantine X328250	Maine	USA	5-26-24	002-32-4787	Asst.	Mother, Kathleen E., 83 Center St. Bangor, Maine
23	James E. Bruce X407975	Ill.	USA	4-14-21	351-14-4422	Ch. Pump.	Mother, Mary, 13605 Vim Avenue Harvey, Ill.
24	Ignacio Colon X342084	Puerto Rico	USA	2-5-03	096-12-8149	2nd Pump-Fire, Boatsw.	Wife, Rose, 1650 Madison Avenue New York, New York
25	Leslie R. Perry X278647	Penn.	USA	12-30-05	134-14-0123	Oiler	Sister, Rosalie, 90 Audubon Avenue New York, New York
26	Wm. Chester X625830	New York	USA	9-9-00	131-12-4107	Oiler	Mother, Cassie, 1014 Rose Street Bronx, New York
27	Herman H. Roe X607729	New Hampshire	USA	4-1-97	002-18-8743	Oiler	Father, Harold Garner, New Hampshire
28	Jesus Sierra X364328	Honduras	Honduras	4-17-04	572-30-6311	F.W.T.	Wife, Margarita, 37 Moore Street Brooklyn, New York
29	Rufus Robertson X424810	Bermuda (Nat.)	USA	10-25-13	108-18-2382	F.W.T.	Friend, J. Jordan, 307 East 77th St New York, New York
30	Alexander Pasiecznik X687677	New York	USA	4-8-18	113-07-3015	F.W.T.	Stepmother, Mrs. Anne Pasiecznik 67 3rd Avenue, New York, New York
31	Edward R. Boughner X302927 X577321	Maine	USA	1-28-07	007-05-4035	Wiper	Mother, Mary, 15 Lorin St. Bangor, Maine
32	Alexander C. Vallimont	Penn.	USA	2-8-23	204-11-1499	Wiper	Mother, Mary Brookville, Pa.
33	Paulino Bonnelistes X72274	Oregon	Oregon	1-1-97	112-10-8178	Wiper	Wife, Afranda, 301 East 116 St. New York, New York
34	Mathias Schiffers X73081	Germany (Nat.)	USA	3-23-96	084-14-4134	Ch. Steward	Wife, Hedwig, 905 Clinton St. Hoboken, New Jersey
35	Segundo Corchado X270998	Puerto Rico	USA	7-30-90	099-08-3414	Ch. Cook 2nd Cook	Wife, Myra, 246 Putnam Avenue Brooklyn, New York
36	William Thompson X136599	Georgia	USA	12-24-91	015-14-0054	3 Cook	Sister, Mrs. Mary Louis, 1913 Felicitas St., New Orleans, La.
37	Inacio A. De Melo X330646	Brazil	Brazil	6-16-11	126-18-9916	Galleyman	Wife, Katherine, 112 East 74 St. New York, New York
38	Mario Medina X51994	Cuba	Cuba	8-31-12	477-36-1396	Steward	Mother, Vincente Prieli Havana, Cuba
39	Paul E. Gilpin X131780	Penn.	USA	7-11-03	161-10-5142	Steward	Sister, Inez, 919 E. 105th St. New York, New York
40	Alexander Toth X697766	New Jersey	USA	1-4-09	165-14-2095	Pantryman	Brother, Leslie, 25-47 38th St. Astoria, Long Island, New York
41	Matthew Caplis X681335	New York	USA	3-11-21	079-16-2173	Pantryman	Mother, Sara, 29 E. 3rd St. Brooklyn, New York
42	John A. Dozier X95421 D-2	Georgia	USA	9-27-10	139-16-4772	A.B.	Mother, Mrs. Annie, 3038 Eden S' Savannah, Georgia

70b

Drawing by Wit. Schiffer showing location of poop deck, marked Exhibit P-4 id. upon taking of deposition

P Ex (4)-id
1/20/54
JCN



The United States
LAW WEEK

Supreme Court
Docket

September 13, 1955 • WASHINGTON, D.C. • Volume 24, No. 9

CASES DOCKETED

Cases Filed Last Two Weeks

A list is given below of cases filed on the appellate docket of the Supreme Court for the last two weeks; showing the number of the case; its title; date of filing; the procedure of certiorari or appeal followed in seeking review; the court below and citation to its opinions, when given by the petition or otherwise available; and the general subject matter of the case.

The list of cases docketed follows:

354 Housing Authority of City of Milwaukee v. Lawson. 8-27-55, cert., Wis SupCt (270 Wis 269, 70 NW2d 605). Housing—public housing—requirement that tenants sign certificate of nonmembership in subversive organizations—constitutionality—Gwinn Amendment.

355 Bardin v. United States. 8-29-55, cert., CA 7. Criminal law and procedure—tax evasion—fair trial—government attorney's alleged misconduct.

356 Lewis v. Carver. 8-29-55, cert., CA 5. Federal procedure—appeals—appealability of order denying motion to set aside final judgment.

357 Wolfe v. National Lead Co. 8-29-55, cert., CA 9 (223 F2d 195, 105 USPQ 462). Trade marks—infringement—marks and names subject to ownership—geographical names—use of term "Dutch Boy" in connection with paint.

358 Subin v. Goldsmith. 8-30-55, cert., CA 2. Corporations—stockholders' suits—action to enjoin directors' approval of stock purchase contract.

359 Bride v. Comr. Internal Revenue. 8-30-55, cert., CA 8. Taxation—penalities—corporation's retention of profits to prevent imposition of surtax upon shareholders.

360 United States v. Atchison, Topeka & Santa Fe Ry. Co. 8-30-55, cert., US CtCls (130 FSupp 593, 23 LW 2565). Railroads—freight rates—Government's right to land-grant rates—military shipments.

361 United States v. American-Hawaiian Steamship Co. 8-30-55, cert., US CtCls (124 FSupp 378). Eminent domain—just compensation—Government's wartime requisition of steamship.

362 Goldsmith v. Subin. 8-20-55, cert., CA 2 (23 LW 2637). Federal procedure—summary judgment—stockholders' derivative suit.

363 Comr. Internal Revenue v. Estate of Dix. 8-30-55, cert., CA 2. Taxation—gross income — funds misappropriated from family corporation by dominant stockholder—taxability.

364 Pender v. Clark County. 8-30-55, appeal, Nev SupCt (279 P2d 659). Taxation—state real property tax—nonpayment—validity of tax sale—right of redemption.

365 T. A. Loving & Co. v. United States. 8-31-55, cert., US CtCls. Public contracts—price adjustments—interpretation of federal construction contract.

366 Naim v. Naim. 8-31-55, appeal, Va SupCtApp, (23 LW 2650). Domestic relations — miscegenation — validity of Virginia's miscegenation statute.

367 LaRose v. Wyman. 9-1-55, cert., CA 9, Armed Forces—conscientious objectors—draft classification—appeals—fair administrative hearing.

368 New York Central R.R. Co. v. Ruddy. 9-1-55, cert., CA 2. Railroads—Federal Employers' Liability Act—negligence—res ipsa loquitur.

369 Pagano v. United States. 9-1-55, cert., CA 2. Criminal law and procedure—conspiracy—fair trial—admissibility of testimony.

370 Kansas City Power & Light Co. v. McKay. 9-1-55, cert., CA DC (23 LW 2553). Public utilities—Rural Electrification Act—Administrative Procedure Act—Government financing of proposed cooperative power facilities—power companies' standing to sue for injunctive relief.

371 Howard Foundry Co. v. Hartford Fire Ins. Co. 9-2-55, cert., CA 7 (222 F2d 767). Insurance—fire insurance—coverage of policy.

372 China Daily News, Inc. v. United States. 9-2-55, cert., CA 2. Aliens and citizenship—Trading With the Enemy Act—violation—constitutionality of Act's penal provisions.

373 Comr. Internal Revenue v. LoBue. 9-2-55, cert., CA 3 (223 F2d 367, 23 LW 2643). Taxation—gross income—gain from exercise of stock options—taxability.

374 Walker v. State of Texas. 9-6-55, cert., Tex CrCrimApp. Criminal law and procedure—grand juries—racial discrimination in selection of grand jurors.

375 Automobile Ins. Co. v. United Fruit Co. 9-6-55, cert., CA 2 (24 LW 2011). Shipping — fire losses—Fire Statute — carrier's liability for loss of dangerous cargo—failure to comply with Coast Guard Stowage regulations.

376 Smith v. United States. 9-7-55, cert., CA 5. Criminal law and procedure—conspiracy—admissibility of evidence.

377 Eastern Sugar Associates v. Pena. 9-7-55, cert., CA 1 (222 F2d 934, 12 WH Cases 519). Labor—Portal-to-Portal Act—applicability to wage claim arising under Puerto Rican law—limitation of actions.

378 First National Bank v. Comr. Internal Revenue. 9-8-55, cert., CA 2 (221 F2d 959). Taxation—gross income—determination of bad debt charge-offs.

Subject-Matter Summary Of Cases Recently Filed

A subject-matter summary of cases recently docketed on the appellate docket of the Supreme Court in which printed petitions or statements have been filed is given below.

The summary includes for each case (1) an index line of the subject matter; (2) the court below, its ruling, and citation to or date of its opinion or order; (3) the principal questions presented by the petitioning or appealing party; (4) the procedure followed in seeking review, the date of filing in the Supreme Court, and counsel for petitioner or appellant; and (5) the number and title of the case.

The summary follows:

Admiralty

176

Evidence—Appeals in admiralty—Applicability of Rule 52(a), Federal Rules of Civil procedure.

Ruling below (CA 9, 221 F2d 916):

Shipowner suing repairer whose employees allegedly caused fire in ship's hold by negligent use of acetylene torch did not sustain its burden of proving that fire was started by use of said torch.

Questions presented: (1) Can United States court of appeals properly treat admiralty appeal as trial de novo or can it exercise no greater scope of review than that permitted under Federal Rules of Civil Procedure, Rule 52(a); (2) did court of appeals exceed permissible scope of review under Rule 52(a) in rejecting trial court's findings, which were based on uncontradicted substantial evidence, and in substituting therefor other inferences based on testimony rejected by trial court.

Petition for certiorari filed June 23, 1955, by Chalmers G. Graham, Francis L. Tetreault, and Graham, James & Rolph, all of San Francisco, Calif.

No. 176. Waterman Steamship Corp. v. Triple A Machine Shop, Inc.

Antitrust Laws

132

Cartels—Jurisdiction to compel domestic corporation to compete in foreign countries.

Ruling below (DC SOhio, February 8, 1954):

Agreement between American, French, and British corporations to divide world

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markets in prismatic glassware, to suppress competition, and to exchange patents, trade marks, and technical information, violates Section 1 of Sherman Act; United States is entitled to decree requiring American corporation affirmatively to compete in foreign territories which had been allocated to its co-conspirators.

Questions presented: (1) Does federal district court, which has jurisdiction only over American member of illegal cartel arrangement, have power to compel American member to compete in foreign territories which had been allocated to foreign members; (2) are contracts imposing territorial and other restrictions upon parties to sale of a business per se violative of antitrust laws.

Appeal filed June 8, 1955, by Howard F. Burns, Richard F. Stevens, Sam S. Fitzsimmons, all of Cleveland, Ohio, Shepard Broad, Lewis Horwitz, both of Miami Beach, Fla., Baker, Hostetler & Patterson, and Broad & Cassel.

No. 132. Holophane Co., Inc. v. United States.

Attorneys

244

Admission to practice—Qualifications—Good moral character—Due process and equal protection of laws.

Ruling below (Calif SupCt, April 20, 1955):

Application for admission to the California state bar was properly denied by State bar examiners upon finding that applicant had not sustained burden of proving that he was possessed of good moral character and that he did not advocate overthrow of Government by force and violence.

Questions presented: (1) Does denial of admission to bar, based upon applicant's failure to establish good moral character because of his political and social views, deprive applicant of due process and equal protection of laws; (2) does denial of admission to bar, based solely on alleged membership in an organization not illegal at time of alleged membership, violate right of assembly protected by First and Fourteenth Amendments; (3) does California State Bar Act, as construed to place upon applicant burden of proof to establish that he does not advocate overthrow of Government by force and violence, violate due process.

Petition for certiorari filed July 18, 1955, by Edward Mosk, Hollywood, Calif, and Samuel Rosenwein.

No. 244. Konigsberg v. State Bar of California.

Criminal Law and Procedure

77

Tax evasion—Fair trial—Instructions to jury.

Ruling below (CA 9, 218 F2d 505):

Tax evasion defendant who admitted receiving unreported sums on wartime liquor sales at over-ceiling prices, but testified that he paid over-ceiling prices for such liquor and hence realized no taxable income on sales, was not prejudiced by instruction that jury would be justified in returning guilty verdict if they were convinced beyond reasonable doubt that his testimony should not be believed; trial court did not abuse its discretion in refusing, after both parties had rested, to reopen case to permit defense to subpoena additional witness who had testified at former trial, with whose testimony defendant was familiar, and who could have been subpoenaed during trial.

Questions presented: (1) Was conviction secured by unfair and improper trial tactics; (2) was it reversible error to instruct jury to convict petitioner unless they believed in his testimony; (3) did trial court err in refusing to reopen case to permit defense to subpoena an additional witness.

Petition for certiorari filed May 13, 1955, by Harold Leventhal, Washington, D. C. and Leo R. Friedman, San Francisco, Calif.

No. 77. Wolcher v. United States.

103

Tax evasion—Fair trial—Selection of jury—Charge to jury.

Ruling below (CA 6, 220 F2d 252):

United States District Court for Eastern District of Michigan did not abuse its discretion in denying tax evasion defendant's motion challenging array of petit jury panel drawn from only two of 16 counties comprising District, even though prior tax evasion prosecution of defendant's brother had been widely publicized in those two counties; instruction that tax evasion defendant had nondelegable duty to file correct and accurate income tax return was not erroneous.

Questions presented: (1) Was petitioner denied right of trial by impartial jury in violation of Sixth Amendment by reason of geographical discrimination in selection of jurors and fact that jurors were drawn from counties wherein prior tax evasion prosecution of petitioner's brother had been widely publicized; (2) is taxpayer's duty to file correct and accurate income tax return nondelegable; (3) was district court required by Federal Rules of Criminal Procedure, Rule 31(c), to instruct jury that petitioner could be convicted of lesser offenses defined by Sections 3616(a) and 145(a) of 1939 Internal Revenue Code.

Petition for certiorari filed May 27, 1955, by William E. Leahy, Washington, D.C., James E. Haggerty, Harry Cohen, and Harry M. Nayer, Detroit, Mich.

No. 103. Garlepy v. United States.

135

Indictment and information—Duplicitous indictment—Conspiracy—Evidence—Accomplice testimony—Instructions to jury.

Ruling below (CA 7, 222 F2d 144):

Indictment count charging single conspiracy to commit both misdemeanors and felonies was not duplicitous, promotions of postal employees are to an "appointive office or place" within Section 215 of Federal Criminal Code, which prohibits solicitation or receipt of any money " in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States"; absent corroboration of any federal conspiracy defendant's testimony by any of his codefendants, no defendant was entitled to instruction that testimony of one accomplice cannot be used to corroborate that of another.

Questions presented: (1) Is indictment count charging single conspiracy to commit both misdemeanors and felonies void for duplicity; (2) is promotive office an appointive office or place within purview of Section 215 of Federal Criminal Code; (3) were defendants entitled to instruction that testimony of one accomplice cannot corroborate testimony of another accomplice.

Petition for certiorari filed June 9, 1955, by Frank W. Oliver, Chicago, Ill.

No. 135. Echeles v. United States.

215

Extortion—Mailed threat to injure person of addressee—Evidence.

Ruling below (CA 7, 222 F2d 1):

Letter demanding $10,000 from addressee, stating that "this is it, get it and get it straight because you have only one chance," and admonishing addressee to "make it easy on yourself by cooperating fully," contained "threat to injure the person of the addressee," and violated Section 876 of Federal Criminal Code.

Question presented: Did letter contain specific "threat to injure the person of the addressee" within purview of Section 876 of Criminal Code.

Petition for certiorari filed July 8, 1955, by George F. Callaghan, Chicago, Ill.

No. 215. Prochaska v. United States.

218

Fair trial—Rape—Right to continuance—New trial—Evidence.

Ruling below (SC SupCt, February 4, 1955, April 14, 1955):

Trial court did not abuse its discretion in denying continuance to allegedly sick rape defendant who county physicians testified was well enough to stand trial; court properly instructed jury that if female was under age of consent, proof of force was unnecessary; evidence of unnatural sex act committed by rape defendant upon prosecutrix subsequent to offense charged was admissible as tending to show continued illicit intercourse between parties; defendant was not entitled to remand of case for hearing on motion for new trial on after-discovered evidence.

Questions presented: (1) Did denial of continuance to seriously ill defendant deprive him of effective assistance of counsel and violate due process; (2) did admission of evidence of other crimes violate due process; (3) absent evidence of force or violence, was it denial of due process to submit issue of common law rape to jury; (4) was it denial of due process to refuse to remand case for hearing on motion for new trial based on showing that State's principal witnesses had recanted their testimony.

Petition for certiorari filed July 11, 1955, by C. T. Craydon, Columbia, S.C., and Aubrey Harley, Newberry, S.C.

No. 218. Whitener v. State.

234

Indictment and information—Obstruction of justice—Sufficiency of indictment.

Ruling below (CA 6, June 15, 1955):

Indictment alleging that accused willfully endeavored to influence specified witness in designated case, "endeavoring to influence, obstruct, and impede the due administration of justice," sufficiently charged violation of Section 1503 of Federal Criminal Code which makes it unlawful for person "corruptly" to influence any federal court witness "in the discharge of his duty" or "corruptly" to endeavor to "influence, obstruct, or impede, the due administration of justice."

Question presented: Was indictment insufficient for failure to use words "corruptly" and "in the discharge of the duty of the witness," and for failure to aver that petitioner knew that person was in fact a witness.

Petition for certiorari filed July 14, 1955, by Recs H. Davis, Cleveland, Ohio.

No. 234. Seawright v. United States.

236

Fair trial—Prosecution's alleged use of perjured testimony—Right to new trial.

Ruling below (Tex CtCrimApp, January 5, 1955):

Unverified motion for new trial alleging that conviction was obtained by prosecution's knowing use of perjured testimony was insufficient as pleading and properly dismissed by Texas trial court.

Question presented: Was conviction obtained by prosecution's knowing use of perjured testimony, in violation of Fourteenth Amendment's Due Process Clause.

Petition for certiorari filed July 14, 1955, by Charles W. Tessmer, James L. Mitchell, and Tom Howard, all of Dallas, Tex.

No. 236. Reynolds v. State.

POOR COPY

Domestic Relations

223

Divorce—Property settlement agreement—Full faith and credit—Fraud.

Ruling below (Ohio CtApp, December 20, 1954):

Property settlement agreement incorporated into Illinois divorce decree is entitled to full faith and credit and cannot be attacked by wife in Ohio court on ground of fraud, absent showing that jurisdiction over one of parties or over subject of Illinois action was obtained by fraud.

Question presented: Does Full Faith and Credit Clause preclude Ohio court from modifying property settlement agreement procured by husband's fraud in misrepresenting and concealing his assets, and incorporated into Illinois divorce decree.

Petition for certiorari filed July 11, 1955, by Henry B. Street, Alva W. Goldsmith, Douglas G. Cole, George H. Palmer, all of Cincinnati, Ohio, Philip R. Toomin, and Benjamin B. Davis, both of Chicago, Ill.

No. 223. Block v. Block.

Federal Courts

129

Jurisdiction—Suit to enjoin enforcement of allegedly unconstitutional state statute—Necessity for final state court determination as to constitutionality.

Ruling below (DC N111, 127 FSupp 853):

In absence of Illinois Supreme Court determination as to Illinois Community Currency Exchange Act's constitutionality, Illinois federal district court has no jurisdiction to entertain injunction suit challenging Act's constitutionality.

Questions presented: (1) Is federal district court's jurisdiction dependent upon prior Illinois Supreme Court determination as to Community Currency Exchange Act's constitutionality; (2) does Act, which imposes license fees and restrictions upon sale of money orders issued by plaintiffs while specifically exempting sales of certain express company's money orders from such requirements, violate Fourteenth Amendment's Equal Protection Clause.

Appeal filed June 6, 1955, by John J. Yowell, Chicago, Ill.

No. 129. Doud v. Hodge.

212

Jurisdiction — Citizenship diversity — Federal question.

Ruling below (CA 5, March 30, 1955):

Florida federal district court properly dismissed for lack of jurisdiction Florida citizen's damage suit complaint alleging neither diversity of citizenship nor presence of federal question.

Question presented: Was complaint properly dismissed.

Appeal filed July 7, 1955, by Pledger L. Burkhalter, Jr., pro se.

No. 212. Burkhalter v. Liberty Mutual Insurance Companies, Inc.

Federal Procedure

214

Venue—Change of venue—Admiralty proceedings.

Ruling below (CA 2, 221 F2d 319):

Seaman's in rem admiralty suit to recover for shipboard injuries sustained in Puerto Rico may be transferred from Southern District of New York, where vessel was seized, to District of Puerto Rico, pursuant to Section 1404(a) of Judicial Code upon shipowner's request and its filing of bond to pay any judgment recovered against vessel, even though no attempt was made to seize vessel in transferee district and suit could not have been commenced there originally.

Questions presented: (1) Does Judicial Code's change of venue provision apply to in rem admiralty suit; (2) does shipowner's consent to change of venue give court authority to order transfer or give transferee court jurisdiction over res.

Petition for certiorari filed July 8, 1955, by Edward A. Martin, Washington, D. C., Jerome Golenbock, and Donald S. Sherwood, both of New York, N. Y.

No. 214. Torres v. Walsh.

221

Appeals—Appealability of order suppressing taking of depositions.

Ruling below (CA 4, 222 F2d 951):

Federal district court order suppressing defendant's taking of depositions in support of citizenship diversity claim pending court's ruling on plaintiff's motion to remand wrongful death action to state court for lack of citizenship diversity, is not appealable under Section 1291 of Judicial Code as "final" order.

Question presented: Is federal district court order suppressing taking of depositions pending court's ruling upon motion to remand appealable under either Section 1291 of Judicial Code as "final" order or Section 1292 as interlocutory order granting or continuing injunction.

Petition for certiorari filed July 11, 1955, by Charles F. Rouse and A. Y. Arledge, both of Raleigh, N.C.

No. 221. Carolina Power & Light Co. v. Jernigan.

Insurance

121

State regulation—Fire insurance rating organizations—Independent insurer's right to use rating organization's rate filing—Due process.

Ruling below (NY SupCt AppDiv, 284 AppDiv 963):

New York Insurance Law (Art. 8, Sec. 184(4)) permits independent insurer, without payment to, or consent of, State-licensed fire insurance rating organization, to file rates identical to those filed by organization and to use all supporting information filed by organization.

Question presented: Does Article 8, Section 184(4) of New York Insurance law, as applied to permit expropriation and use of rating organization's expensive and complex rating system without its consent and without payment, violate Fourteenth Amendment's Due Process Clause.

Appeal filed June 2, 1955, by Samuel A. Berger, New York, N. Y.

No. 121. Cullen v. Bohlinger.

Labor

200

Unfair labor practices—Discharge of economic strikers—Evidence.

Ruling below (CA 6, 219 F2d 874, 35 LRRM 2559):

Evidence supported National Labor Relations Board finding that employer did not discharge economic strikers in violation of Section 8(a)(3) of Taft Act by notifying them in writing that their employment would be terminated upon their failure to report for work on specified date, in view of fact that employer reemployed all unreplaced strikers who applied for work after termination date; although termination notice violated Section 8(a)(1) of Taft Act, it did not prolong strike or convert it into unfair labor practice strike.

Questions presented: (1) Did employer discharge striking employees in violation of Section 8(a)(3) of Taft Act; (2) did evidence support Board's finding that strike was economic in its inception; (3) did employment termination notice prolong strike or convert it into unfair labor practice strike; (4) did lower court erroneously rely upon facts outside record in sustaining Board's decision.

Petition for certiorari filed July 1, 1955, by Poole, Pearce & Hall, Warren E. Hall, Jr., Fred W. Elarbee, Jr., Margaret Hills Fairleigh, and Edwin M. Pearce, Atlanta, Ga.

No. 200. Shopmen's Local Union No. 733 v. National Labor Relations Board.

241

Strikes—Violation of Taft Act's 60-day notice provision.

Ruling below (CA 8, 221 F2d 231, 23 LW 2552, 36 LRRM 2037):

Strike called without notice after four months of unsuccessful negotiations for modification of collective bargaining contract following its anniversary date violated Taft Act's 60-day notice provision and contract's no-strike and 30-day termination notice clauses even though union had given 60-day notice of its desire to modify contract.

Question presented: Did strike, which was called in support of modification demands prior to contract's termination date but after expiration of 60-day notice period, violate 60-day notice provision in Section 8(d)(4) of Taft Act.

Petition for certiorari filed July 15, 1955, by Solicitor General, Theophil C. Kammholz, General Counsel, David P. Findling, Associate General Counsel, Dominick L. Manoli, Assistant General Counsel, and Dueane Beeson, NLRB attorney.

No. 241. National Labor Relations Board v. Lion Oil Co.

Motor Carriers

158-161

Judicial review—Interstate Commerce Commission's determination of exempted agricultural commodities.

Ruling below (DC STex, 128 FSupp 374):

Interstate Commerce Commission order, entered in nonadversary proceedings, determining that certain specified commodities fall within agricultural exemption in Section 203(b)(6) of Interstate Commerce Act, is not "order" subject to judicial review under Section 205(g) of Interstate Commerce Act, Section 10 of Administrative Procedure Act, or Sections 1336, 1398, 2284, and 2321-2325 of Judicial Code.

Question presented: Is Interstate Commerce Commission's order determining that certain specified commodities fall within Interstate Commerce Act's agricultural exemption subject to judicial review in carrier's action to enjoin order's enforcement.

Appeals filed June 17, 1955, respectively, by Phinney & Hallman, Carl L. Phinney, Leroy Hallman, Dallas, Tex.; by Leo H. Pou, ICC Associate General Counsel; by Rollo E. Kidwell, Callaway, Reed, Kidwell & Brooks, Dallas, Tex., Peter T. Beardsley, Fritz R. Kahn, Clarence D. Todd, Dale C. Dillion, Todd, Dillon & Curtiss, Washington, D. C.; and by Edwin N. Bell, Houston, Tex., Carl Helmetag, Jr., Philadelphia, Pa., James W. Nisbet, Chicago, Ill., Margaret P. Allen, Joseph H. Hays, and Charles P. Reynolds.

Nos. 158-161. Frozen Food Express v. United States; Interstate Commerce Comm. v. Frozen Food Express; American Trucking Association, Inc. v. Frozen Food Express; Frozen Food Express v. United States.

Railroads

225

Mergers—Protection of employment rights—Obligation of railroad.

Ruling below (CA 5, 219 F2d 650):

Railroad which was not made party and did not appear in Interstate Commerce Commission proceedings wherein

majority of its stock was acquired by another railroad is not bound by Commission's order conditioning approval of acquisition upon protection of employees of "carrier or carriers * * * affected by such order," in accordance with Section 5(2)(f) of Interstate Commerce Act.

Question presented: Is Commission's employment protection order applicable to and binding on all parties to consolidation.

Petition for certiorari filed July 11, 1955, by Dart, Guidry, Price & Read, and Louis C. Guidry, all of New Orleans, La.

No. 225. McDow v. Louisiana Southern Ry. Co.

Schools and Colleges

238

Discrimination—Expulsion of state university law school student—Mandamus.

Ruling below (Calif SuperCt, Los Angeles Cty, February 23, 1954):

Mandamus will not lie to review dismissal of California state university law school student for failure to meet school's scholastic requirements.

Question presented: Did petitioner's dismissal from state university law school, ostensibly for failure to meet scholastic requirements but in reality for his unpopular social and political views, and denial of judicial review deprive him of due process and equal protection of laws and abridge his privileges and immunities as citizen of United States.

Appeal filed July 14, 1955, by Joseph A. Cota, pro se.

No. 238. Cota v. Coffman.

Shipping

105

Shipowner's liability—Injury to seaman—Validity of release.

Ruling below (CA 3, 221 F2d 559):

Shipboard injury claim release, voluntarily executed by seaman for adequate consideration after shipowner's claim agent had told him that case was weak, was not invalidated by subsequent discovery that injuries were more serious than indicated by earlier medical reports.

Question presented: Was release executed by seaman with full understanding of his rights and for adequate consideration, notwithstanding mistaken prognosis, claim agent's erroneous representation that case was weak, and fact that seaman had no medical or legal advisers.

Petition for certiorari filed May 28, 1955, by Silas Blake Axtell, John A. Gleason, both of New York, N.Y., Martin G. Stein, Brooklyn, N.Y., Elmer C. Miller, and Charles A. Ellis.

No 105. Thompson v. Coastal Oil Co.

Taxation

148

Practice and procedure—Excise tax—Fraud penalties.

Ruling below (CA 10, 219 F2d 732):

Neither Section 3(a) of Administrative Procedure Act nor procedure published by Bureau of Internal Revenue in Federal Register relating to excise tax assessments requires that taxpayer be given opportunity for conference prior to assessment of excise tax deficiencies and fraud penalties, since Section 3312(b) of 1939 Internal Revenue Code permits tax assessment without notice in fraud cases.

Question presented: Where fraud is claimed, does Section 3312(b) of 1939 Internal Revenue Code excuse Collector of Internal Revenue from complying with Administrative Procedure Act, and procedure published by Bureau of Internal Revenue in Federal Register requiring 15-day notice to taxpayer and opportunity for conference prior to assessment of excise tax.

Petition for certiorari filed June 13, 1955, by Glen E. Fuller, Jack R. Decker, Shirley P. Jones, and Shirley P. Jones, Jr., all of Salt Lake City, Utah.

No. 148. Mullett v. Korth.

171

Inventories—Limitation upon time in which to make involuntary liquidation of inventory—Validity.

Ruling below (US CtCls, 130 FSupp 818):

Commissioner of Internal Revenue properly limited to six months time to make election with respect to involuntary liquidation of inventory under Section 22(d)(6) of 1939 Internal Revenue Code, as amended by Act of September 5, 1950.

Question presented: (1) Did Commissioner, in limiting to six months time to make election with respect to involuntary liquidation of inventory under Section 22(d)(6), disregard retroactivity of Act of September 5, 1950, to taxable years beginning after December 31, 1940; (2) may Commissioner, by regulation, defeat specific congressional intent to make statute retroactive.

Petition for certiorari filed June 22, 1955, by Jay O. Kramer, New York, N.Y.

No. 171. Huron Milling Co. v. United States.

249

Gross income—Gain from realty sale—Taxability as ordinary income or as capital gain.

Ruling below (CA 9, 221 F2d 478):

Ordinary income and not capital gain was realized in transaction wherein husband and wife, both real estate agents, acquired unimproved land in 1939 in exchange for their residence, intending to use it for new residence, for truck farming, and as long-term investment, but which, by making additional cash expenditure, they subdivided and sold at profit in 1946 after municipal ordinance precluded its use for residence or truck farming, since sale was in regular course of business.

Question presented: Was real estate which was acquired by petitioners in 1939 for use as personal residence, for truck farming, and for investment, and sold by them in 1946, held "primarily for sale to customers in the ordinary course of * * * trade or business" within meaning of Sections 117(a)(1) and 117(j) of 1939 Internal Revenue Code.

Petition for certiorari filed July 20, 1955, by Willard C. Mills, Washington, D.C.

No. 249. Shearer v. Smyth.

Trade Regulation

243

Price fixing—Louisiana Fair Trade Act—Cut-rate sales of fair traded products on physicians' prescriptions.

Ruling below (CA 5, 221 F2d 326, 23 LW 2556):

Drug retailer's cut-rate sales of fair traded products on physicians' prescriptions mentioning them by their trade name constitute violations of federal district court injunction under Louisiana Fair Trade Act.

Question presented: Are drugs, which are sold on prescription, subject to fair trade price fixing if (1) they are dispensed in containers bearing no reference to manufacturer's trademark, brand, or name, (2) purchaser does not rely on manufacturer's trademark, brand, or name, and (3) seller has no choice as to which drug to sell or to promote and purchaser has no choice as to which drug to buy.

Petition for certiorari filed July 16, 1955, by John Minor Wisdom, Saul Stone, Wisdom, Stone, Pigman & Benjamin, and Walter J. Wadlington, III, all of New Orleans, La.

No. 243. Schwegman Bros. Giant Super Markets v. Hoffmann-LaRoche, Inc.

United States

231

Federal Tort Claims Act—Liability for confiscation of Indians' livestock on federal range—Taylor Grazing Act.

Ruling below (CA 10, 220 F2d 666):

United States is not liable under Federal Tort Claims Act for Interior Department agents' confiscation of Navajo Indians' livestock on Utah federal range pursuant to Utah statute providing for elimination of abandoned horses; Taylor Grazing Act, 32 U.S.C. 315 et seq, authorizes enforcement of state police statutes on public lands administered under Act.

Question presented: Is United States liable under Federal Tort Claims Act for Interior Department agents' confiscation and destruction of Navajo Indians' livestock on federal range pursuant to Utah "abandoned horse" statute.

Petition for certiorari filed July 13, 1955, by Milton A. Oman, Salt Lake City, Utah, Norman M. Littell, Charles J. Alexander, Marvin J. Sonosky, all of Washington, D. C., and Lawrence A. Davis, Window Rock, Ariz.

No. 231. Hatahley v. United States.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 105.

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

BRIEF IN OPPOSITION.

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WILLIAM THOMPSON,

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COASTAL OIL COMPANY,

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BRIEF IN OPPOSITION.

Certiorari should be denied because there are no special or important questions involved.

Rule 19 of the Revised Rules of the Supreme Court of the United States specifically points out that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The sole question involved is the validity of the seaman's release. The applicable law, as summarized by this Court in *Garrett* v. *Moore-McCormack*, 317 U. S. 239, is as follows:

> "We hold, therefore, that the burden is upon one who sets up a seaman's release to show that *it was* executed freely, without deception or coercion, and that *it was* made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal

advice available to the seaman *at the time of signing the release* are relevant to an appraisal of this understanding." (Emphasis supplied.)

These principles were expressly set out by the Third Circuit Court of Appeals in its opinion holding the release valid (9-a of petitioner's appendix). That Court then applied the facts, as determined by the District Court, to the established rule and held the release valid as a matter of law. The decision of the Third Circuit is not in conflict with any other Circuit, has not departed from the applicable decisions of this Court, and has not departed from the accepted and usual course of judicial proceedings.

Before going into the matter of release, petitioner's argument that the Circuit Court of Appeals made a new determination of acts in violation of Rule 52 of the Federal Rules of Civil Procedure and the decision in the *McAllister* case, 348 U. S. 19, should be dispensed with. The Third Circuit Court of Appeals made no new determination of the facts. It took the facts as determined by the District Court, but arrived at a different conclusion of law, that the release was valid. Whether or not the existence of certain determined facts constitutes mistake, misrepresentation or overreaching, is a question of law.

The petitioner summarized the case generally in his petition. The important facts in the record relied upon by the Circuit Court of Appeals to uphold the release were:

1. The seaman, after his discharge from the United States Marine Hospital where he was treated for the injuries sustained, voluntarily called upon the owner's agents and opened settlement discussions. At the time he was equipped with his discharge slip from the Marine Hospital (Appellant's Appendix to Circuit Court 203-a).

2. During his 3½ months period of hospitalization, the seaman had rejected the services of some 12 to 16 attorneys (Appellant's Appendix to Circuit Court 248-a), and expressly indicated his intention to handle his claim himself in nine letters written to the Company (Appellant's Appendix to the Circuit Court 338-a and 346-a).

3. The seaman's discharge slip from the United States Marine Hospital, given about a month prior to signing the release, indicated that he would be fit for duty in about one month. No prediction was made of any permanent disability (Appellant's Appendix to the Circuit Court 319-a).

4. The Marine Hospital was a neutral and independent medical expert.

5. The seaman was never refused maintenance, but on the contrary, requested and received an advance to take private treatment at Hot Springs, Arkansas (Appellant's Appendix to Circuit Court 203-a and 204-a).

6. Dr. Farr, who examined for the shipowner and whose findings were related to petitioner prior to signing the release, predicted a longer recuperating period than the Marine Hospital, namely, three months, and also estimated there would be a partial, permanent disability of 10% (Appellant's Appendix to Circuit Court 158-a and 159-a).

7. No medical evidence was offered at the trial by the seaman that he was permanently disabled more than 10%.

8. The seaman returned to work one month ahead of Dr. Farr's prediction and has been steadily employed up to the present time at ratings both below and above his

rating at the time he was injured (Appellant's Appendix to Circuit Court 334-a).

9. The seaman, William Thompson, had previously negotiated releases (Petitioner's Appendix 10-a).

10. While the District Court held there was a misrepresentation by the claim agent when he told the petitioner that he had a case of questionable liability (there being no notice of vicious propensities, and the *Keen* decision not having been rendered, 194 Fed. 2nd 515), the Circuit Court felt that even if the situation was one of liability, $4,000.00 was adequate in that petitioner earned $248.00 a month and was disabled only 4½ months.

11. While the seaman was hospitalized subsequent to his signing his release, it was principally for causes completely unrelated to the accident of January 13, 1950; For instance, from February 16 to April 20, 1951, he was treated for a duodenal ulcer and urethritis; From June 11, to July 1, 1951, at the Baltimore Marine Hospital, he was treated for kidney trouble; From February 13 to March 3, 1952 at Stapleton, Staten Island he was treated for a penal sore and a duodenal ulcer; From March 28 to April 9, 1952 at the Baltimore Marine Hospital, he received a prostate operation (Appellant's Appendix to Circuit Court 321-a to 326-a).

A review of the following release cases indicates that both the Circuit Court and the District Courts have been most able in applying the rule of the *Garrett* case without review by this Court. For instance, in the *United States* v. *Johnson,* 160 Fed. 2d 794, the Circuit Court said, in holding the release invalid:

> "Measured by the yardstick, established by the Supreme Court, previously quoted from *Garrett* v. *Moore McCormack, supra,* this release cannot stand

> because it was not 'made by the seaman with full understanding of his rights'."

No one fact is used to determine whether a release is valid or invalid. The latter Courts have considered all the facts and then determined whether the release was adequate, executed freely and understandably, with sufficient medical and legal advice available. Also see:

Bay State Dredging & Contracting Co. v. *Porter,* 1946, 153 Fed. 2d 827;
German v. *Carnegie,* 169 Fed. 2d 715;
Muruaga v. *United States,* 172 Fed. 2d 318;
Johnson v. *United States,* 186 Fed. 2d 120;
Water v. *United States,* 191 Fed. 2d 212;
Kelcey v. *Tankers Company,* 217 Fed. 2d 541;
The Montague, 53 Fed. Sup. 548;
The Francis Parkman, 80 Fed. Sup. 22;
Haddock v. *North Atlantic & Gulf,* 81 Fed. Sup. 421.

Interesting language with respect to releases is contained in two Circuit Court decisions where certiorari was denied prior to rendering an opinion in the *Garrett* case.

In *Bonici* v. *Standard Oil,* 103 Fed. 2d 437; 1949 A. M. C. 583, certiorari denied, The Court said:

> "Hence, while 'one who claims that a seaman has signed away his rights to what in law is his due must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman,' (Harman *v.* U. S., 5 Cir., 59 F. 2d 372, at p. 373), nevertheless, a release fairly entered into and fairly safeguarding the rights of the seaman, should be sustained. Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's stand-

> point and thus tend to force the seaman more regularly into the courts of admiralty. Even if a seaman is the court's ward, the court cannot be always at hand to watch over him, for it can only move ponderously in a formal law suit. Fair settlements are in the interest of the man, as well as of the employers. This conclusion is substantiated by the fact that Congress when it legislated as to one form of releases, namely those for wages, nevertheless did so on the basis that the release was good until set aside, for it provided that 'any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require' (Act of March 4, 1915, chap. 153, Sec. 4, 38 Stat., 1164, 1165, 46 U. S. C. A., Sec. 597; *Pacific Mail Steamship Co.* v. *Lucas*, 258 U. S. 266)."

In the second case, *Sitchon* v. *American Export Lines*, 113 Fed. 2d 830, 1940 A. M. C. 1298; certiorari denied 1940 A. M. C. 1672, the Court said:

> "If such a settlement as the one in the case at bar is voidable, no release by a seaman could ever be free from attack, if he subsequently discovered that his injuries were greater than he anticipated when executing the release.
>
> "When a seaman has made a settlement after full investigation and with independent advice, we can see no ground for holding it invalid. The question in any case is whether the seaman, if he is acting alone, has intelligence enough to fully understand the situation and the risk he takes in giving up the right to prosecute his claim, or whether, if he is acting under advice, that advice is disinterested and based on a reasonable investigation."

An interesting comment by a lower Court in a situation where the medical condition of a seaman changed for the

worse after the signing of the release is *McGraw* v. *States Steamship Company*, 1954 A. M. C. 148:

> "The evidence at the trial establishes the fact that libellant took the initiative in suggesting a settlement. In the light of the known medical history at the time, there was no overreaching on respondent's part. Libellant McGraw, himself, obtained the abstract of the clinical record from the Marine Hospital which showed that the libellant was then suffering from painless gross hermaturia—etiology unknown. This record was further substantiated by the report from the Bluff Hospital, Yokohama, Japan, which was known to both parties.
>
> "On February 21, 1952, based on the Marine Hospital report and that of the Bluff Hospital, libellant was paid maintenance to and including February 28, 1952, together with his unearned wages and transportation.
>
> "Dr. Berger of the Marine Hospital confirmed the clinical reports, through a telephonic communication to the office of the claim agents, at which time libellant was present. Respondent was in no better position to determine the clincial or medical facts than was libellant and the future of the course of the case from a medical viewpoint was problematical and in the realm of speculation. The apparent kidney ailment might have corrected itself in a matter of weeks.
>
> "Based on the information in possession of both parties, the settlement was a fair one and the consideration was adequate. Subsequent developments showing the need for extended medical treatment and care, were not anticipated by either party and do not control in determining the validity of the release. Any financial pressure which libellant was under at the time of settlement was not known to respondent's representative."

From the preceding, it will appear that the Circuit Court for the Third Circuit made a proper application of the *Garrett* rule in upholding the release entered into by Thompson. There is nothing unusual about the *Thompson* case.

WHEREFORE, it is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No. 105

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 105

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the United States District Court, District of New Jersey, Richard Hartshorne, D. J., (R. 14a-27a; Appendix to Petition pp. 13a-25a) is reported in 119 F. Sup. 838 and 1954 A. M. C. 1190.

The original opinion of the Court of Appeals for the Third Circuit (Appendix to Petition pp. 6a-12a) and the opinion of that court *en banc* on motion for rehearing and the dissenting opinion by Chief Judge Biggs and Judge McLaughlin (Appendix to Petition pp. 1a-3a) are reported in 221 F. 2d 559.

Jurisdiction

The decision and judgment of the Court of Appeals was entered January 28, 1955 (Appendix to Petition pp. 3a-4a). By order made February 28, 1955 said Court of Appeals recalled the mandate and extended the time for filing a petition for rehearing to March 15, 1955 (Appendix to Petition p. 4a). A timely petition for rehearing was filed on March 12, 1955; and on April 22, 1955 said Court denied rehearing (Appendix to Petition p. 5a) with two judges dissenting and rendering a dissenting opinion (Appendix to Petition pp. 1a-3a). The petition for certiorari was filed May 28, 1955, and was granted October 10, 1955. On November 14, 1955, this court made an order granting petitioner's motion to waive the printing of the record. The jurisdiction of this court is found in 28 U. S. Code, Sections 1254(1) and 2101(c).

Statutes Involved

The statutes involved, Section 33 of the Jones Act, 41 Stat. 1007, 46 U. S. Code § 688; § 1 of the Employers' Liability Act, 35 Stat. 65 amended 53 Stat. 1404, 45 U. S. Code § 51, and statute respecting willful breach of duty by a seaman, 18 U. S. Code § 2196, formerly 46 U. S. C. § 704, R. S. § 4602, are as follows:

46 U. S. C. § 688. Recovery for injury to or death of seaman.—Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury and in such action all statutes of the United States conferring or

regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

45 U. S. C. § 51. Every common carrier by railroad while engaging in commerce between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or territories and any foreign nation or nations shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees, of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

18 U. S. C. § 2196. Drunkenness or neglect of duty by seamen— Whoever, being a . . . seaman . . . or other person employed on any merchant vessel, by willful breach of duty . . . does any act . . . tending immediately to endanger the life or limb of any person belonging to or on board of such vessel . . . shall be imprisoned not more than one year.

Questions Presented

Whether the District Court properly set aside the seaman's release herein and rendered judgment for plaintiff's damages, and the Court of Appeals erred in reversing.

Petitioner presents as subsidiary questions those numbered 1 to 6 in the petition (pp. 3-4) and those which petitioner stated that petitioner proposed also to argue in the event that the writ was granted (Petition, p. 4).

See the more detailed statement of these questions in the petition (pp. 3-4).

Statement of the Case

The action is by a seaman, under the Federal Maritime Law and statutes relating to seamen for damages sustained by him from a murderous assault committed on him on shipboard by another seaman with a meat cleaver, wherein the District Court held a release executed by the seaman invalid and awarded the seaman damages, and the Court of Appeals reversed on the ground that the release was binding. Rehearing motion considered by the court of seven judges *en banc* was denied, with two judges dissenting. The five judges who held the release binding (Judges Maris, Goodrich, Kalodner, Staley and Hastie) are judges from Pennsylvania; and the dissenting judges (Chief Judge Biggs and Judge McLaughlin) are from Delaware and New Jersey. Cf. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, revg. 344 Pa. 69, 23 A. 2d 503.

Petitioner was second cook on defendant's S. S. Rosina Marron. One Medina, a Cuban, was mess man. Medina was an effeminate "queer," called "Rosina" and other feminine names by all on board, including the Captain (Schiffer, Appendix for Appellee below, p. 48a).

On the night of January 12, 1950, seeking someone to play cards with, petitioner, upon opening the door to a room occupied by seamen Pittaway, Schopf and another, found Medina engaged in homosexuality simultaneously with Pittaway and Schopf (R. 77a, 212a, 213a, 215a). He reported this both to his superior, the Chief Steward, Schiffer and to the Union Delegate, Caplis (R. 76a).

Defendant's counsel admitted it was reported to the Steward (R. 211a). Schiffer testified it was reported to him by Thompson at about 5:30 A.M. on the morning of the 13th; that it was his duty to report it to the Captain; he reported it to the Captain at about 7:00 A.M., just before breakfast, and the Captain said Medina had reported it himself to the Captain (Appendix for Appellee below, pp. 50a-53a). Schiffer considered perverts danger-

ous (*Id.*, 55a, 66a). Caplis testified that at about 1:00 or 1:30 in the afternoon Medina stated he was going to kill Thompson (*Id.*, 31a-32a). Caplis did not consider homosexuals appropriate shipmates (*Id.*, 33a).

Even before the 12th, report had been made to the Steward that Medina went around kissing fellows and that he was not fit to be waiting on the crew and not fit to be a member of the crew (R. 209a). Schiffer testified he had observed this some two months before the accident (Appendix for Appellee below, 44a-45a).

On the evening of January 13, 1950 a meeting called by Union Delegate Caplis was held, attended by (among others) Medina, Pittaway, Schopf and petitioner, as the parties to be questioned on the report. Pittaway and Schopf did not admit the act, wanted it not to be reported, and offered to leave the ship at the next port. But Medina left the meeting earlier than the others, got a meat cleaver from the galley, and as petitioner and others were leaving along a dark passageway, he struck petitioner three times over the head with the meat axe, in an attempt to kill him (R. 83a-84a).* Petitioner was treated in the ship's hospital (R. 86a) and on arrival on Sunday, January 15, 1950 at Corpus Christi was removed from the ship and taken to a hospital (R. 87a-88a; 222a-223a). He underwent subsequent extended treatment in Marine Hospitals at Galveston, New Orleans and Stapleton.

While in the hospital at Corpus Christi he exchanged letters twice with defendant's agents, Sieling & Jarvis (R. 95a-99a). They had a local agent pay him $100 for transportation to New Orleans (R. 99a). While there he was subpoenaed for Medina's trial in Corpus Christi and took the trip as far as Houston, but got very sick and was sent by ambulance to the Marine Hospital at Galves-

* Medina was placed in irons and turned over to the Coast Guard on arrival at Corpus Christi (Appendix for Appellee below, pp. 28a, 64a) and later convicted and sentenced to prison.

ton, the trial being postponed because of his illness (R. 99a-100a). An agent called on him there and asked if he needed any money, but petitioner said he had enough to carry him along (R. 100a). The agent gave him a card and told him to call up Sieling & Jarvis if he needed any assistance.

While in the hospital at Galveston petitioner "went crazy" or "cracked up" and two days after this was sent to John Seeley Hospital to see a Specialist who gave him an electroencephalogram (described rather than named by petitioner), but told petitioner he was not permitted to tell him about his condition (R. 101a-102a). Later petitioner attended the trial at Corpus Christi and then came to the hospital at Stapleton (R. 102a), where he was sent to Ellis Island and given the same electroencephalogram test (R. 102a). He asked the doctor if he would "make the grade" and was told "Yes, you will make the grade"; but this doctor also told him he was not allowed to tell petitioner a thing (R. 102a).

The hospital records of both the Galveston Marine Hospital (R. 318a) and of the Stapleton Marine Hospital (R. 319a) show a diagnosis "Encephalopathy due to trauma".

While in Staten Island Marine Hospital he needed $50, and because Sieling & Jarvis had told him if he needed cash, to call them up, he did so and it was sent over right away (R. 103a).

He remained in the hospital until some three weeks before the settlement, and then defendant's agent, Mahoney, advanced him $300.00, which he used to go to Arkansas, where he took hot baths and came back feeling better (R. 103a-104a, 203a-205a) and discussed settlement with Mr. Mahoney and later with Barron. Mahoney told him the best they could offer was about $4,000.00, "because you are well" (R. 106a-107a), and defendant's Dr. Farr told him he was a well man (R. 107a).

Dr. Farr was hired by the ship owners to "make a report to them, to help them price the value of this case" (R. 165a). He was not a neurologist (R. 166a). He made a physical examination of petitioner in May of 1950, but was not sure that he saw at that time any hospital record showing a diagnosis of encephalopathy due to trauma, but has seen them since (R. 167a). He prescribed three months further convalesence period or until about August, 1950, and then a ten percent permanent disability (R. 159a). Yet, about a week before the trial, in 1954, when he examined him again, he found his complaints "almost identical with the previous ones" (R. 168a), and his conclusion was that in 1954 the seaman was "slightly better than he was in 1950" (R. 165a). Dr. Farr's 1954 examination showed still a faint line of vertical fracture and that the healing "has progressed quite satisfactorily but not completely" (R. 162a). He testified that the petitioner was not faking; he had symptoms when originally examined in 1950 "and I think the same symptoms are renewed" (R. 164a).

Dr. Somberg (petitioner's witness), who was a neurologist (R. 120a), testified that the fractured skull sustained in January, 1950 gave rise to organic brain disease, as the result of which plaintiff had an anxiety state bordering on schizophrenia; that the blows on the head with the meat cleaver were the producing cause of that brain disease (R. 124a-125a); and that the disability and pains would be throughout life (R. 130a).

Barron, the Claim Adjuster, saw petitioner twice at the instance of Sieling & Jarvis—before he went to Arkansas, and after he returned (R. 258a-259a). He had him examined by Dr. Farr, but did not have the doctor's report with him at the first conference (R. 259a-260a). The seaman wanted $15,000.00, but he thought he talked him down to $6,000.00 at the first meeting—without the doctor's report (R. 259a-260a). He had clinical abstract from the

hospitals (R. 264a), which showed in bold type "encephalopathy due to trauma", which he knew meant not just concussion, but brain damage (R. 265a), but testified:

> "Q. Did you discuss this encephalopathy with him? A. No, I don't believe I did" (R. 264a).

He read to the seaman "that portion of the report" from Dr. Farr that he would have ten percent disability with some two or three months further convalescence before returning to work (R. 260a). "I told him what the doctor told him, and that was it" (R. 262a).

He was familiar with the law in regard to liability, and didn't believe petitioner had a good case against the ship owners (R. 263a). He testified that in his understanding of the law at the time, "notice" of the assaulting man's vicious propensities was necessary to recovery (R. 275a). He told petitioner what his thoughts were as to the law, and that petitioner had "a weak case" (R. 264a 278a).

There was a brief period of maintenance, for out-patient treatment; and "we discussed the possibility, of course, that if he could not substantiate his claim he would be entitled to no more than the two hunderd dollars" (R. 261a).

Asked on cross-examination "How did you make up this four thousand dollars?", Barron testified that he estimated approximately $200.00 for maintenance and cure, and the loss up to that time of five or six months base wages and overtime at about $250.00, or maybe a little better a month, "so his total special damage could not have been more than two thousand dollars, at tops, if, of course, there was any liability at all"; if there was no liability he would be entitled to about $200.00 "and that would be it", and for purposes of settlement his special damages "would make it about two thousand dollars". Although he had talked petitioner down from Fifteen Thousand Dollars to Six Thousand Dollars, he stated (R. 266a-267a):

"Mr. Thompson, himself, gave a figure of six thousand dollars as a figure which he would be willing to take . . . So I pointed out to him that if he were to accept four thousand dollars in settlement he would probably be saving some money for himself because most attorneys, so far as I know, take at least one-third of any figure in settlement; some take forty percent; some take fifty, but the average runs to about a third, and if he were to take about four thousand dollars *he would be getting as much with four thousand as if he had retained an attorney and paid an attorney the other two thousand dollars*" (R. 267). . . .

"The Court: Well, then, to make a long story short, discounting the question of liability, discounting the attorney's fees, *both of which are substantial items,* you allowed him two thousand dollars for his disability, his brain disability, brain damage?

The Witness: If he had any" (R. 267a-268a) (Italics ours.)

Barron testified that it was not in his mind that two years before the trial petitioner would have to give up being a sea cook or a cook of any kind, but he expected him to continue going to sea as a cook (R. 272a). If he had known otherwise he would not have evaluated the case as he did (R. 272a-273a); he would not have allowed him to take the Four Thousand Dollars but would have told him to get a lawyer, because he was going to be a sick man (R. 274a). He testified that "I would have been mistaken if Dr. Farr's prognosis was wrong. My evaluation would have been other than it was", "And of the consideration" also (R. 271a); that he took Dr. Farr's word or report, and if that was incorrect he told Thompson that he was in a much less serious condition than he may now possibly be (R. 276a).

Petitioner testified that if he had known that he was to undergo suffering such as he had since signing the release,

he would have died before he would have signed it (R. 108a); and that "I would have never signed it because I keep going in and out of hospitals since" (R. 109a).

Due to the injury he had found it impossible to work as a ship's cook or second cook, because he couldn't work around the range, "and then I got to take the lowest job on the boat now, between a dishwasher or a galley utility, something that I get away from the range" (R. 113a). Even during trial, his head was bandaged from treatment of a Marine Hospital Doctor (R. 115a-116a), Dr. Farr having removed the bandage to make an examination just before the trial and replaced it with a bandage from Dr. Farr (R. 116a-117a).

The District Court, during Barron's testimony, indicated that, in view of the *Keen* case, there had been a mistake of law (R. 269a-270a), and at the Court's question Barron admitted that if Dr. Farr's prognosis was wrong, then since Barron had accepted that prognosis there had been a mistake of prognosis (R. 271a). To a question by the Court, Barron testified that his understanding of the law "now turns out to be wrong" and he "told Thompson wrong innocently", and he took Dr. Farr's word and "told Thompson that he was in a much less serious condition than he now may possibly be" and "therefore, told Thompson wrong as to the medical fact innocently", and he didn't know "what advice he got on the outside" (R. 276a-277a).

Petitioner testified that prior to the settlement "I didn't see any lawyer at all on the whole case. I was going by what Mr. Mahoney said, that he would do right by me"; when some lawyers approached him he told them that "No, I was going to the company, they promised to do good by me and I just don't want any lawyer" (R. 108a). "I had no lawyer, I was depending on them" (R. 110a).

Even the letters from petitioner to Mahoney, which defendant introduced to show that petitioner had been ap-

proached by attorneys, actually show the pitifully complete reliance of petitioner on Sieling & Jarvis and Mahoney: "I am sure when I get well they will take care of me the best they can . . ." (R. 198a). "Please keep my job for me. Thank you" (R. 198a-199a). "I told them I am still sick and don't want to talk to any lawyer. It is three months now since I got hurt. So many different ones come to try and get me to talk to them. I won't talk to or see anyone until I have seen someone from Sieling and Jarvis . . . Please let me hear from you soon so I can know what to do. Lots of guys are telling me different tales. I don't listen to them" (R. 201a). See Defendant's Exhibit No. 2—nine letters (R. 338a-346a, marked in evidence R. 201a).

The District Court found the vessel unseaworthy and the release invalid, and held defendant liable for an additional $16,000 damages. The Court found that there had been mistake and misrepresentation by defendant to the seaman of both his disability and his legal rights.

The Court of Appeals majority, in reversing, acknowledges "Encephalopathy due to tramua" (Appendix to Petition—p. 7a); that it is true that the petitioner did not have independent medical advice of his choosing; that Dr. Farr reported a 10% disability and that petitioner would not be able to work for three months; that during negotiations for the release petitioner was not represented by counsel (*Id.* p. 8a); "that Thompson had been told the success of his case was dependent upon a showing that the defendant had or should have had notice that Medina's presence created a risk of danger to the crew" (*Id.* p. 10a); that "Since the signing of the release, plaintiff has continued to suffer from the effects of the head blow, having been hospitalized" in 1952 and 1954, and is still receiving out-patient treatment; and that "it is patent that his injuries have proved more serious than was thought at the time of the release . . . True, the plaintiff is now known to have suffered to a greater extent

than was previously thought" (*Id.* pp. 8a-9a). But the Court of Appeals holds that he was not precluded from the procuring of counsel, having been deluged during his hospitalization with offers of legal service; that no coercion was involved (*Id.* pp. 10a-12a); and that any misrepresentation made "being grounded on available and honestly entertained opinion, cannot be made the basis for nullifying this settlement" (*Id.* p. 11a). By contrast, the two dissenting judges, on motion for rehearing, pointed out that Barron told Thompson that he had a weak case, both as to measure of damages and the law; that as a matter of fact Thompson had suffered more serious injury than was realized; he is a Negro with but slight formal education, who had suffered a severe head injury and had developed psychoses, and that "Barron's statement as to the status of the law was incorrect and if he did not know this he should have for no decided case lay against Thompson". "Barron made use of the sort of language which claim adjusters are accustomed to use when dealing with a claimant with whom they are entitled to negotiate at arms length. But Thompson was a seaman, a ward of the admiralty and it is clear, as the District Court found in substance, that he was overreached" (*Id.*, 2a-3a).

Summary of Argument

Petitioner being a seaman, the wardship theory applies. The burden was on defendant to prove that the release was made by the seaman petitioner for adequate consideration and with full understanding of his rights. This requires proof of full and correct understanding of his disability and of his legal rights and a payment adequate to cover his actual damage and rights. This would have been required even if defendant had made no representations to the seaman in procuring the release. But instead of defendant proving this, both parties proved and the

court found that the release was procured by representations, which proved to be misrepresentations made to the seaman by defendant's agents.

Defendant was liable for petitioner's injury and damage both under the Jones Act, and for unseaworthiness by reason of the presence on board, as a member of the crew, of Medina, a known pervert and "queer", who attempted to kill petitioner in a murderous assault with a meat cleaver. Such liability did not require proof by plaintiff that defendant had "notice" of his dangerous character; and defendant's agent Barron, by his own testimony, misrepresented to petitioner his legal rights and that he had a weak case, with only $200.00 maintenance likely to be recovered.

It was also represented to petitioner that he was practically well, and would be fit for work within three months, with only a 10% permanent disability; whereas four years later he was still disabled at time of trial. And after talking petitioner down from $15,000.00 to $6,000.00 by such representations, Barron—representing that petitioner would save money by settling without hiring an attorney and incurring an attorney's fee—then induced petitioner to further reduce the claim by one-third representing an attorney's fee.

The District Court's findings, both of unseaworthiness and of invalidity of the release, were findings of fact not clearly erroneous.

The Court of Appeals majority erred in holding the release binding; its judgment should be reversed and the judgment of the District Court should be reinstated and affirmed.

ARGUMENT

I

This seaman was a ward of admiralty without legal or medical advisers, and defendant was obliged to correctly explain to him, so that he would correctly and fully understand, both his legal rights and the extent of his disability and damage, and to pay him a consideration reasonably adequate to satisfy his rights.

The risk was on defendant that the representations made by its agents in procuring the release should prove to be erroneous and the amount of the settlement inadequate.

This Court has consistently held that seamen are a special class, unlike men who work ashore, and are to be treated by the courts as wards, whether in sustaining as constitutional stern laws for enforcing service discipline and punishment of seamen (*Robertson* v. *Baldwin,* 165 U. S. 275, 287 (1897), or in liberally construing laws made for benefit of seamen (*Bambridge* v. *Merchants and Miners,* 287 U. S. 278, 282 (1932); *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 377 (1932); *Warner* v. *Goltra,* 293 U. S., 155, 162 (1934); *Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779, 782, 783 (1952), or in invalidating contracts and releases made by seamen without adequate consideration and full understanding of their rights (*Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 246, 247 (1942); Mr. Justice Story at Circuit, in *Harden* v. *Gordon,* 2 Mason 541, Fed. Case No. 6047 (1823).

So exceptional is their status that, like children with their parents or guardians, the Thirteenth Amendment of the Federal Constitution prohibiting involuntary servitude

does not apply to their contracts of service. *Robertson* v. *Baldwin, supra,* 165 U. S. 275, 282-283, 288). Compare *The Case of Mary Clark,* 1 Blackf. (Ind. S. C.), 122, 125; *Clyatt* v. *U. S.,* 197 U. S. 207, 215; *U. S.* v. *Reynolds,* 235 U. S. 133, 144, holding that other servants have a constitutional right to break contracts of service.

For centuries seamen were treated as wards in the "admiralty" courts, which once exclusively administered the "maritime" law. Now, with law courts open also to many maritime disputes, this Court has held that they must be equally so treated in courts of "law" (*Garrett* v. *Moore-McCormack Co., supra,* 317 U. S. 239, 246, 247).

By Congress, Parliament, and the Courts alike, seaman as a class are treated

> "as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense which minors and wards are entitled to the protection of their parents and guardians . . . The ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly"
>
> *Robertson* v. *Baldwin, supra,* 165 U. S. 275, 287 (1897);
>
> *Cortes* v. *Baltimore Insular Line, supra,* 287 U. S. 367, 377 (1932);
>
> *Isbrandtsen Co.* v. *Johnson, supra,* 343 U. S. 779, 783 (1952).

All seamen by reason of the very nature of their calling, are inherently such as to be easily imposed upon (cf. *Patterson* v. *Bark Eudora,* 190 U. S. 169, 175, 176 (1903)). They work upon ships, mostly at sea, "with constant shuttling between unfamiliar ports", and are but temporarily in port (either domestic or foreign), unless during disability so invariably attended with poverty and

destitution that for centuries their maintenance and cure when suffering from injury, has been required of the shipowner under the laws of all the principal maritime nations of the world. *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 727 (1943).

As this Court said in *Cortes* v. *Baltimore Insular Line, supra,* 287 U. S. 367, 377:

> "The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This Court has said that the ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly".

In *Garrett* v. *Moore-McCormack Co., supra,* 317 U. S. 239, 246, 247, 248, this court, quoting Mr. Justice Story's holdings in *Harden* v. *Gordon, supra* (2 Mason 541, 11 Fed. Cases No. 6047) that seamen "are emphatically the wards of the admiralty"; that the same principles of equity apply to their contracts as in the cases of young heirs, wards and their guardians and *cestuis que* trust and trustees, specifically held that the burden is upon the one who sets up an injured seaman's release to prove its validity and not upon the seaman to establish its invalidity. This court further held:

> "We hold, therefore, that the burden is upon one who sets up a seamen's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman *with full understanding of his rights.* The *adequacy of the consideration* and the nature of the *medical and legal advice* available to the seaman at the time of signing the release are relevant to an appraisal of this understanding" (317 U. S. 248). (Italics ours.)

This court held that the seamen's right in this respect "was a part of the very substance of his claim" and ap-

plicable in a law action as well as in admiralty (317 U. S. 249). The substantive rights of a person injured on board a vessel are not to be determined differently, whether his case is labeled on the law side or admiralty side of a Federal District Court docket. (*Pope & Talbot* v. *Hawn*, 346 U. S. 406 (1953); *Seas Shipping Co.* v. *Sieracki*, 338 U. S. 85, 88, 89 (1946).

The same wardship principles were applied respecting seamen's releases in *Bonici* v. *Standard Oil Co.*, 2d Cir., 103 Fed. 2d 437 (1939); cert. denied, 308 U. S. 560, 636; *Hume* v. *Moore-McCormack Lines*, 2nd Cir., 121 Fed. 2d 236 (1941); *Stuart* v. *Alcoa*, 2nd Cir., 143 Fed. 2d 178 (1944), and *Kelcey* v. *Tankers Co., Inc.*, 2nd Cir., 217 Fed. 2d 541. Both the *Bonici* and *Stuart* cases involved the fact, such as the District Court herein found, that the disability was considered less serious at the time the release was given than it eventually turned out to be, and that the consideration paid was inadequate for the disability which actually existed.

As the opinion in *Garrett* v. *Moore-McCormack Co., supra*, shows, its requirement that the release be made by the seaman "with full understanding of his rights", for adequate consideration, and upon proper advice, is in accord with the law affecting trustees and beneficiaries. This court cited *Michoud* v. *Girod*, 4 How. (45 U. S.) 503, 556.

Restatement of Trusts, § 170(2) says that a trustee dealing with a beneficiary on the trustee's account must communicate to the beneficiary all material facts "which the trustee knows or *should know*." Section 216 (2) with reference to consent of beneficiary and § 217 (2) with reference to discharge of liability by release or contract further emphasize these requirements. Sub-paragraph (b) under both Sections shows that a consent or release is not effective if the beneficiary did not know of his rights and of the material facts which the trustee knew or should have

known; and sub-paragraph (e) specifies a bargain "which was not fair and reasonable." See also, *Restatement of Restitution,* Sec. 191; *Restatement of Agency,* Sec. 390.

Restatement of Restitution, Sec. 55 (b) specifies "justifiable reliance upon an innocent misrepresentation of law by the other"; and comment (c) "Innocent misrepresentation" states that "a person is entitled to rely upon statements of law by those who stand in a confidential relation to him."

4 Pomeroy's Equity Jurisprudence, 5th ed., Sec. 1083 page 1089 states:

> "If a trustee relies on a release or discharge given by the beneficiary it is incumbent upon the trustee to show that he gave the cestui que trust *full information as to all his rights;* and it is, in fact, a part of the trustee's general duty to impart knowledge of his own legal rights to the beneficiary."

3 Pomeroy's Equity Jurisprudence 5th ed., Sec. 953a, page 783, states that:

> "a presumption of invalidity arises from the transaction itself and the burden of proof rests upon . . . the party claiming the benefit of the contract to show affirmatively its perfect fairness, and that a full and adequate consideration was paid."

See also page 784.

Restatement of Restitution, Sec. 11, covering "Assumption of risk of mistake. Compromise", as respects parties generally, even where there is not a fiduciary relationship, points out that "even a specific statement by the parties that the transaction is final does not make it such." Being based upon assumptions that certain facts exist, the transaction will be set aside "if the basic assumptions are not true."

Here, contrary to the view of the Court of Appeals that petitioner's rejection of the solicitations of ambulance chasers tended to relieve defendant of its burden and make petitioner assume the risk of any mistake, the reverse is true. His very rejection of these solicitations evidenced and expressed confidence in and reliance on defendant. Moreover, Barron's representation that he would save money by not hiring an attorney increased defendant's obligation. And, finally, Barron's prevailing on him to discount his claim by the percentage an attorney's fee would amount to, in effect placed defendant additionally in the position of paid counsel for petitioner.

In every aspect of the "settlement" the risk was on defendant that any of the representations by defendant of facts or points of law on which it was based was mistaken or erroneous.

II

Defendant was liable for petitioner's damages, and the District Court correctly held that defendant's representation to the contrary misrepresented the law.

Barron himself testified that he represented to petitioner that in order to recover damages petitioner would have to prove that defendant had notice that Medina was a dangerous character, and that accordingly his case was very "weak" for any recovery beyond $200.00 maintenance. Defendant, however, was liable both under the Jones Act, and for unseaworthiness under the Maritime Law, and the representations by which Barron procured the release, misrepresented the law.

The law, as represented by defendant, requiring "notice" of an employee's incompetence was pre-statutory common law of master and servant applicable on land before the enactment of employers' liability legislation. See, for example, *Fletcher* v. *Baltimore & Potomac R. R. Co.*, 168 U. S. 135 (1897). It has nothing to do with Jones Act liability, or the Maritime Law liability for unseaworthiness. It is based upon the general principle of

common law that anyone is liable for his own negligence; hence, if a master is negligent in selecting or controlling employees, even the common law made such master liable.

By contrast, the Jones Act imposes liability not only for defendant's own negligence, but for the negligence of any of its "officers, agents or employees." Over a century ago, in *United States* v. *Brig Malek Adhel,* 2 How. (43 U. S.) 210, 233 (1844), this court held that where an act of Congress contains several (there five) acts specified as actionable "Either is sufficient" (2 How. 233). And of the Jones Act, this court held, in *Johnson* v. *U. S.,* 333 U. S. 46, 49 (1947), that:

> "While the acts of negligence underlying such accidents may reach higher into the management hierarchy than the one involved here, the Federal Employers' Liability Act compels us to go no higher than a fellow servant".

Assault by an "officer" is criminal under 18 U. S. C. § 2191, formerly 46 U. S. C. § 712; hence it could not be in performance but instead is in violation or "breach" of his authority and duty.

This court has held in *Jamison* v. *Encarnacion,* 281 U. S. 635 (1930) and *Alpha Steamship Corporation* v. *Cain,* 281 U. S. 642 (1930), that since unquestionably inadvertence or carelessness is within the prescribed liability for negligence "it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, *a much graver breach of duty,* was not negligence within the meaning of the Act" (281 U. S. 641).

The murderous assault herein was clearly a willful "*breach of duty*" by Medina as a seaman "employed on" a merchant vessel within 18 U. S. C. § 2196, formerly 46 U. S. C. § 704 which provides:

> "Whoever, being a . . . seaman . . . or other person employed on any merchant vessel, by willful *breach of*

duty . . . does any act . . . tending immediately to endanger the life or limb of any person belonging to or on board of such vessel . . . shall be imprisoned not more than one year".

The murderous assault herein, therefore, was a "breach of duty" by one for whose "breach of duty" defendant was liable under the Jones Act as construed in the *Jamison* (281 U. S. 635), *Cain* (281 U. S. 642) and *Johnson* (333 U. S. 46, 49) cases. Indeed, in *Steeley* v. *Kurn*, 313 U. S. 545 (1941), reversing *Steeley* v. *Kurn*, 347 Mo. 74, 146 S. W. 2d 598, see also *Steeley* v. *Kurn*, 348 Mo. 1142, 157 S. W. 2d 212, this court in effect so held. The Missouri Supreme Court had held defendant not liable where a fellow servant "intentionally, deliberately and maliciously assaulted the plaintiff by 'dropping the rod', thereby seriously injuring him" (347 Mo. 79). This court reversed in a one sentence *per curiam*, citing *Jamison* v. *Encarnacion*, *supra*.

See note discussing "Unprovoked Assaults under the Jones Act", 40 Va. L. Rev. 610-620 (1954).

To hold instead that a "breach of duty" assault by another seaman is not within the Jones Act, in effect eliminates the word "employees" from the Federal statute, and reduces it to the scope of the New York Employers' Liability Act (17A McKinney's Con. Laws) which in § 2, paragraph 2 confines recovery under the State Act to cases of negligence of persons "intrusted with any superintendence or . . . authority to direct, control or command any employee in the performance of the duty of such employee." Compare *Bomba* v. *Borowicz*, 2nd Dept., 265 App. Div. 198 decided under the New York statute.

In addition, here there was also negligence of the Chief Steward and the Captain, to both of whom the incident of the 12th had been reported early on the 13th; many hours before this murderous assault occurred on the night of the 13th. In both aspects, there was Jones Act liability, *i. e.*, for the "breach of duty" act of Medina in committing the

assault, and for the negligence of the Chief Steward and the Captain. Barron's representation to the contrary misrepresented the Jones Act.

The liability for *unseaworthiness,* moreover, is clearly established, and has indeed already been recognized by this Court with reference to this case.

In *Keen* v. *Overseas Tankship Corporation,* 2d. Cir., 194 Fed. 2d 515 (1952), cert. denied, 343 U. S. 966 (1952), on returning from shore leave drunk, and quarreling over seaman Keen's failure to pay second cook Mruczinski a gambling debt, Mruczinski, after being knocked down by Keen with his fist, went to the galley, got hold of a meat cleaver, came back and from behind struck Keen a blow in the head causing him serious injuries (194 Fed. 2d 516). The Court of Appeals in reversing a dismissal and ordering a new trial, applied the warranty of seaworthiness to the member of the crew, Mruczinski, as a warranty that "he is equal in disposition and seamanship to the ordinary men in the calling" (194 Fed. 2d 516).

In *Boudoin* v. *Lykes Bros. Steamship Corp.,* 348 U. S. 336, 99 L. Ed. 296 (1955), this court cited the *Keen* case with approval and applied the principle where a drunken deck maintenance man, Gonzales, going to the room of plaintiff and taking a bottle of brandy from under plaintiff's bed, attacked plaintiff with the bottle when plaintiff awoke startled. This court stated that in such cases the problem is one of degree, the question being

> "Was the assault within the usual and customary standards of the calling? Or is it a case of a seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature?" (348 U. S. 340.)

It cited in a footnote as illustrating situations involving breach of the warranty of seaworthiness by reason of the disposition of a crew member the District Court decision herein, *Thompson* v. *Coastal Oil Company,* 119 F. Supp. 838, and stated that:

"The Court followed the *Keen* case in holding that a crewman who tried to murder one of his fellows with a meat cleaver was not equal in disposition to those of his calling" (348 U. S. 339).

This case is, indeed, stronger than either the *Keen* or *Boudoin* case, in both of which drunkenness was involved. Here, by contrast, the attempted murderer, Medina, was sober, but he was an effeminate pervert; and as the District Court pointed out, although petitioner had reported a perverted act between Medina and Pittaway, Pittaway did nothing in contrast to Medina attempting to murder petitioner (R. 286a). Moreover, in *Keen*, one blow with the meat cleaver was struck. Here Medina struck petitioner three times, not while under the influence of liquor but in deliberately attempted murder.

The principle requiring fit members of the crew, is an old one. The statute respecting unseaworthiness couples "unfit in her crew" in the term "too leaky or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions, or stores" (46 U. S. C. § 653; R. S. § 4556).

The Propeller Niagara v. *Cordes,* 21 How. (62 U. S.) 7, 23 (1858), and *The Southwark,* 191 U. S. 1, 8 (1903), state that a vessel must be provided with a competent crew.

The Rolph, 9th Cir., 299 Fed. 52 (1924), held a vessel unseaworthy by reason of a brutal mate on board.

The Nordpol, 2nd Cir., 84 Fed. 2d 3 (1936) cert. denied, 299 U. S. 586 (1936), held that the deficiency of one crew member unable to speak English rendered the vessel unseaworthy.

Peninsular & Occidental S. S. Co. v. *N. L. R. B.,* 5th Cir., 98 Fed. 2d 411 (1938), held that "A ship that is not manned by a competent crew is unseaworthy".

Similarly, *Texas Co.* v. *N. L. R. B.,* 9th Cir., 120 Fed. 2d 186 (1941), held that the Captain must "weed out" any

crew members who constitute a menace to general discipline or to safe navigation, even where hired by or through unions under contract.

The law thus fully supports the District Court's finding of unseaworthiness, for which defendant was liable in damages. Barron's representation that there was no liability, misrepresented the law.

III

The District Court correctly held the release invalid and the Court of Appeals erred in reversing. Not only is the reversal contrary to the wardship theory of the maritime law; it is more harsh than decisions invalidating releases or other contracts between equals dealing at arm's length.

The case involves not only a failure by defendant to prove that the seaman made the release with a full understanding of his rights; and not only proof by both parties that the seaman *lacked* such full understanding of his rights; but proof by both parties that the seaman was misled and the release procured by representations, which were misrepresentations made by defendant to the seaman of his rights.

The misrepresentations by which Barron procured the release were three-fold:

1. The misrepresentations of the law noted in the preceding point.

2. The representation that petitioner was well and would be able to return to work within three months with only a ten percent permanent disability, has clearly proved to be false. As even the Court of Appeals majority acknowledged, he continued to be disabled and to be

undergoing treatment at the time of the trial, four years later than the settlement. He has been unable to act as cook aboard vessels, and is reduced, when he can get work at all, to serving as dishwasher or utility man. He continues to be in and out of hospitals.

Encephalopathy due to trauma was not mentioned or explained to him in negotiating the settlement (R. 264a).

3. The representation that he would be saving money by settling with defendant without an attorney, and would get as much by allowing the defendant to retain the equivalent of an attorney's fee as he would get if he hired and paid an attorney, was the means not only of inducing petitioner to settle without legal advice but of reducing the settlement, instead of saving any money to petitioner. For petitioner to get as much as though represented by an attorney, defendant would have to represent him as faithfully as would an attorney of his own and pay petitioner what such an attorney would demand. Then the only possible "saving" by not hiring an attorney would be of the attorney's fee. But instead of "saving" this to the seaman, Barron promptly proceeded to deduct and withhold it for defendant. As the District Court pointed out, and Barron acknowledged, this itself was a "substantial" item (R. 267a-268a). And instead of representing petitioner as an attorney would, to get for petitioner his full rights, defendant, by the other representations, deprived petitioner of his rights.

Not only is this contrary to the treatment a seaman is entitled to under *Garrett* v. *Moore-McCormack, supra,* 317 U. S. 239, 247, 248 (1942). It would render invalid a release even were the burden of proof on plaintiff.

In the case of ordinary individuals, including FELA cases of railway employees, the burden is on the one who has executed a release to establish its invalidity, *Callen* v. *Penna. RR. Co.,* 332 U. S. 6, 25 (1948).

Nevertheless, in the *Callen* case (332 U. S. 6), and in other cases subject to the same rule, mistake, misunderstanding or lack of a full understanding of the rights of the parties, and particularly mistake induced by misrepresentation, will establish invalidity.

In *Union Pacific RR Co.* v. *Harris,* 158 U. S. 326 (1895), this court, affirming a judgment for an injured passenger plaintiff, despite a prior release, approved a charge that

> "if there was a misunderstanding of the facts, whether the facts were willfully misstated by the agent of the railway company or not is not a very material question; but the question is whether the facts were understood by both parties; . . . If the settlement was made with a *full understanding of the rights* of the parties . . . he is concluded" (158 U. S. 332, 333). (Italics ours.)

See also *Chesapeake & Ohio RR Co.* v. *Howard,* 178 U. S. 153, 167 (1900). In *Texas & Pacific Ry. Co.* v. *Dashiell,* 198 U. S. 521 (1905), affirming recovery by an injured railway conductor despite a prior release, this court cited and said of the *Harris* case (158 U. S. 326), *supra:*

> "Enough, however, appears to show that the court submitted to the jury the fact of mistake of injuries received as bearing on the effect of the release and this action was affirmed by this court" (198 U. S. 529).

In *Ciletti* v. *Union Pacific RR. Co.,* 2d Cir., 196 Fed. 2d 50 (1952), sustaining a judgment for additional damages to a husband and wife who were injured passengers, despite prior releases for $6,500, the court, quoting from *Scheer* v. *Rockne Motors Corp.,* 2d Cir., 68 Fed. 2d 942, 945 (1934), said:

> "To tell a layman who has been injured, that he will be about in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it

> is ordinarily more than a forecast; it is an assurance as to his present condition, and so understood."

See also the additional decisions cited in the petition herein (pp. 12-19).

The Restatement states the law to this effect. See *Restatement of Restitution*, § 11, particularly Comment c, and Illustrations 6 and 7 under Comment d; *Id.*, § 19 and the definitions of mistake in *Id.*, § 6 and Comments b and c; 2 *Restatement of Contracts*, §§ 500 and 502; 3 *Restatement of Torts*, § 542 (a), (b), (c) and (d), and Comment d under Clause (c). In *Restatement of Restitution*, § 11, Comment d, Illustration 6 states that where "a neutral doctor" examines an injured person and erroneously makes a report later found to be error as to the extent of injury, "It is a question of fact whether or not the transaction was based upon the assumption" of substantially different harm than in fact existed. Under Illustration 7, where *one of the parties* "employs a physician who makes the report" which later proves to be erroneous, "It may be found that even although the parties intended the transaction to be a final settlement of all harm, however extensive", the party who did not employ the physician "is entitled to have the transaction rescinded because of the misrepresentation" (*Id.*, p. 47).

5 *Williston on Contracts, Revised Ed.* § 1500, states:

> "It is not necessary, in order that a contract may be rescinded for fraud or misrepresentation, that the party making the misrepresentation shall have known that it was false. Innocent misrepresentation is sufficient, for though the representation may have been made innocently, it would be unjust to allow one who has made false representations, even innocently, to retain the fruits of a bargain induced by such representations."

Kerr on Fraud and Mistake, 5th Ed. says, at pages 519-520:

> "But where a person obtains a contract or other advantage by mistake or misstatements innocently made, he cannot retain the advantage he has gained when he discovers his mistake. If he does so his innocent misstatement becomes from that moment a deliberate misrepresentation, or in other words fraud."

These principles of mistake, particularly mistake induced by misrepresentation, are also applicable (even in cases subject to the *Callen* case rule of burden of proof) to mistakes (particularly induced mistakes) of *law.* See in this connection, for comparison of mistakes of fact and mistakes of law *Restatement of Restitution,* Topic 3, Introductory Note, pages 180-181, and § 55.

Over a century ago, in *Wheeler* v. *Smith,* 9 How. (50 U. S.) 55 (1850), this court, reversing and overruling a demurrer, held that if the facts alleged were proved, a release for $25,000 (more nearly equivalent to $100,000 or more today) was void for mistake of law induced by representations (which proved to be misrepresentations) of law. Complainant himself had studied law, and believed originally that his uncle's will, cutting him off, and creating a charitable trust, was invalid. But one of his adversaries "in whom the complainant reposed the greatest confidence" gave his "opinion" that the charitable devise "was a legal and valid disposition" (9 How. 81). Recognizing that "From the high character of the executors, no one can impute to them any fraudulent intent in the transaction" and that "they must have acted under a sense of duty", this court held, nevertheless, that the release "under the circumstances, is void" and said:

> "It cannot be sustained on principles which lie at the foundation of a valid contract. The influences oper-

ating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely, and *with a proper understanding of his rights*" (9 How. 83). (Italics ours.)

In accord, and citing that case, it has been held that where a party, "without any coercion upon him", nevertheless is led into a mistake of his legal rights by reliance upon "the representation as to the law governing his case", there is indeed more than mistake of law, the court saying:

> "*But there was here more than a mistake. . . . The defendant must be presumed to have known that it was liable* . . . and by falsely representing . . . the law applicable to the case . . . it induced the plaintiff to rely upon the superior knowledge that it possessed upon the subject and to surrender to it his claim." (Italics ours.)

Berry v. *American Central Ins. Co.*, 132 N. Y. 49, 54 (1892);

Hudson v. *Glens Falls Ins. Co.*, 218 N. Y. 133, 139 (1916).

To same effect, *Titus* v. *Rochester German Ins. Co.*, 97 Ky. 567, 570-571 (1895).

See also: *Camerlin* v. *New York C. R. R. Co.*, 1st Cir., 199 F. 2d 698 (1952), discussed in the petition, pages 17-18.

The Restatement states the law to this effect, in addition to asserting that there is little if any difference between the effect of mistake of law and mistake of fact. See: *Restatement of Restitution*, § 55 (a) and (b), particularly Comment b entitled "Fraud" and Comment e entitled "Innocent misrepresentation", and Topic 3, Introductory Note, pages 180-181. See also: 2 *Restatement of Contracts*, §§ 474, 500, 502; 3 *Restatement of Torts*, § 545, particularly Comment d.

Accordingly, even were this a case subject to the *Callen* case rule, the release would be clearly invalid. Since it is controlled instead by *Garrett* v. *Moore-McCormack Co., supra,* 317 U. S. 239, the erroneous ruling of the Court of Appeals herein is revolutionary in its comparative harshness to the seaman.

IV

Unseaworthiness, mistake, misrepresentation, and invalidity of the release, were all questions of fact determined by the District Court in petitioner's favor. Under rule 52 the findings and judgment could not be set aside because not clearly erroneous.

McAllister v. *U. S.*, 348 U. S. 19 (1954), establishes that in a seaman's case the question in both the Court of Appeals and this Court as to findings respecting liability by the District Court is "whether the findings of the District Court are clearly erroneous" (348 U. S. 20-21).

The issue of unseaworthiness (or seaworthiness) is an issue of fact, and its determination is a finding of fact (*Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, 98 (1944); *Luckenbach* v. *W. J. McCahan Sugar Refining Co.*, 248 U. S. 139, 145 (1918); *W. J. McCahan Sugar Refining Co.* v. *S. S. Wildcroft*, 201 U. S. 378, 387 (1906); *The Carib Prince*, 170 U. S. 655, 658 (1898); *Steel* v. *State Line S. S. Co.*, L. R. 3 App. Cas. 72, 81, 82, 84, 86, 90, 91). *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336, 99 L. ed. Advance ops. 296 (1955) applies this in holding in an assault case:

> "We think the record does not warrant rejection of the District Court's findings and that the findings warrant recovery for breach of the warranty of seaworthiness" (348 U. S. 338).

In *Callen* v. *Penna. RR. Co.*, 332 U. S. 625 (1948); *Dice* v. *Akron, Canton and Youngstown RR. Co.*, 342 U. S. 359

(1952); *Union Pacific Railway Co.* v. *Harris*, 158 U. S. 326 (1895), and *Chesapeake & Ohio Railway Co.* v. *Howard*, 178 U. S. 153, 167 (1900), the questions of mistake, misrepresentation and resulting invalidity of a release, were held to be questions of fact.

Under Rule 52, Federal Rules of Civil Procedure, determinations of fact by the District Court cannot be reversed unless clearly erroneous. And "the Court of Appeals may not set aside the judgment below unless it is clearly erroneous" (*McAllister* v. *U. S.*, *supra*, 348 U. S. 19, 20).

The Court of Appeals' reversal herein does not purport to determine that any of the findings were clearly erroneous, nor even to question the findings, except in erroneously treating the question of the validity of the release as a question of law controlled by its theory as to "coercion" and "misrepresentation" (viewed apparently as confined to intentionally fraudulent misrepresentation). It does not even treat of the theory of mistake, misrepresentation and resulting invalidity set forth by the District Court.

Under the above cited authorities the evidence herein fully supports the District Court findings and judgment, they are not clearly erroneous, and the reversal was error.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed and the judgment of the District Court reinstated and affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM—1955.

No. 105. 1

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1955.

No. 105.

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

Counter-statement of the Case.

Petitioner, William Thompson, was employed aboard respondent's SS. *Rosina Marron* as second cook from October 20, 1949 to January 15, 1950 at a monthly wage of $248.49. Also employed during this period and for some six months prior thereto, was a crew messman, Mario Medina. These men were the only colored members of the crew aboard. Medina was effeminate (see R. 60a and 61a), although he got on well with the crew. *His record was barren of any evidence of misconduct, viciousness or violence.*

On the night of January 12, 1950 Thompson claimed he found Medina engaged in a homosexual act with certain white members of the crew. He reported this and

on the next night, following a union meeting, Medina waylaid Thompson and assaulted him with a meat cleaver.

The alleged homosexual act is not only uncorroborated but vehemently denied by Schopf, one of the alleged participants (see Schopf's deposition beginning R. 1a).

On January 15, 1950 Thompson was removed from the vessel and hospitalized at the Corpus Christi Marine Hospital. Excerpts from that record appear at R. 314a. On February 10, 1950, he was transferred to the New Orleans Marine Hospital at his own request. There the diagnosis was fracture simple of skull, right parietal lane, lacerated wound of scalp; verruca plana skin dorsum of penis (R. 315a). He left that hospital on March 18, 1950 for purposes of attending at the trial of Medina in the Federal court at Corpus Christi. On route he became ill and spent two days at the Galveston Marine Hospital (R. 316a). He then proceeded to Corpus Christi and testified at Medina's trial. He returned to the Galveston Marine Hospital, and was an in-patient until April 1, 1950 (R. 318a). Upon discharge, he proceeded to New York and was treated at the Marine Hospital at Staten Island, New York from April 9 to April 28, 1950. The final diagnosis there was encephalopathy due to trauma. His condition was marked "improved" and the prognosis marked "good". *One month's convalescence leave was recommended, and it was estimated that he would be fit for duty on May 29, 1950* (R. 319a).

While at these four marine hospitals, petitioner, Thompson, was approached by some twelve to sixteen attorneys, who offered their professional services (R. 248a). These offers petitioner refused as he expressly desired to handle his claim himself. As a matter of fact he wrote nine letters to the owner's agents, Sieling &

Jarvis Corporation, indicating this intention (R. 338a-346a). These letters are most illuminating, and excerpts should be quoted (R. 342a):

> "Some wise guys from the Hall up In New York told some lawyer of my accident. Two of them was here to see me. They tells me a lot of trash. I listen till they were finish. I told them I'm a sick man. When I was well I work for Sieling-Jarvis and up till now they are very nice to me and I'm sure when I get well they will take care of me the best they can. If you two Chissler don't get to hell out of here quick, I will call the doctor. Boy, you ought to see them scramble out. I laugh at them. My head has two compound fractures. I just no I will be up soon. I got my fingers cross. Please keep my job for me. Thank you."

(R. 346a):

> "Please send some one from the office to see me. So many come to see me I told them I'm still sick and don't want to talk to any lawyer. Its three months now since I got hurt. I won't talk to or see any one till I seen some one from Sieling-Jarvis.
>
> I got here Sunday from Corpus Christi.
>
> Please let me hear from you soon so I can no what to do. Lots of guys telling me different tales. I don't listen to them."

While at these four hospitals petitioner experienced considerable pain and knew he was severely hurt as he describes throughout his testimony. Particularly at R. 93a, he tells about overhearing the doctors at Corpus Christi whispering when they thought he was asleep. "He is going to live—but we think he is going to have plenty of trouble."

His letters also indicate an awareness of the extent of his injuries (R. 338a):

> "Dear Sir the Doctors think that the worst is over I'm still a little dizzy. I can set up in bed and walk to the bathroom and back. I'm thankful that I'm alive after what happened. I think I will be able to travel in six or 8 days time if I continue to improve like I'm doing now."

(R. 341a):

> "They refuse so I come on to this hospital. My sister and friends met me at the station and take me here. I did not go home I was feeling sick after the long ride. The doctors here told me I take a hell of a chance riding on a train with a fractured skull. Now I'm back in bed again. But I rather be here with my family than go to Galveston where they wants to transfer me."

(R. 343a):

> "Dear Sir I'm not too well. My head still doing tricks to me. One minute I'm down sick, my head pain very bad, then I feel a little better till the spell come on again. The trial come up Monday. I'm not well, but I'm taking a chance going to Corpus Christi to be at the trial. I almost die on the way over here. I will try and come to New York after the trial. Sir it may be two or three months before I will be able to go back to work. Please sir I like my job on the Rosina please keep it open that I can go back when I'm well."

(R. 344a):

> "I won't be able to work for a while the Dr. say I need lots of rest and quiet if I'm ever to get well. You don't know sir but I sure was hurt triple fractured. I never thought I would be alive to-day."

His own physician, Dr. Somberg, a staff member at the Stapleton Marine Hospital, testified that it was standard procedure at that hospital to familiarize a patient with the extent of his disability at the time of discharge (R. 1 2a).

After his final discharge from Stapleton on April 28, 1950, petitioner lived for a few days at the Seamen's Church Institute, South Street, New York City. Then, equipped with his final discharge slip from the hospital, *he voluntarily* called on a Mr. Mahoney of Sieling & Jarvis Corporation, respondent's agents (R. 203a). He told Mr. Mahoney that he still had severe pain and that he wanted to rest. He expressed the desire to go to Hot Springs, Arkansas. Mr. Mahoney asked him how much he wanted to go, and he said $300.00. This was given to him. He informed Mr. Mahoney that the doctors at the marine hospital said he should rest for a month before going back to work (R. 204a).

(R. 203a):

> "Q. Did Mahoney contact you or did you go to the office? A. No, he didn't contact me, I went to the office, it is just a few blocks.
>
> Q. You went to Mr. Mahoney's office and he—what did he say to you and what did you say to him? Do you recall—is that when you wanted to go to Hot Springs? A. You want to know what I said to him and what he said to me?
>
> Q. Yes. A. Well, he asked me if I am well and I tell him no, I don't think I am quite well because I still had pains in my head but I would like to get some money to go down to Arkansas some place in the country, maybe for two or three weeks and I might be better when I came back.
>
> Q. Did you tell him how much money you needed and did he give it to you? A. He asked me how much I needed and I said three hundred dollars about, and he gave it to me.

Q. When you came to Mr. Mahoney did you have a discharge certificate from the marine hospital? A. From the marine hospital, sure, I got to have one to leave there, you know that.

Q. You gave him that? A. I don't know whether I gave it to him or I kept it but I know I showed it to him.

Q. That is the one that told you you had to lay off for a month before going back to work, is that right? A. Yes."

He returned from Hot Springs after three weeks and then again went to Mahoney on his own.

At respondent's request, a physical examination was arranged to be conducted by Dr. Charles E. Farr. This was conducted on May 18th. Dr. Farr found that the man had a fractured skull and was suffering from considerable nervous shock (R. 158a). Dr. Farr suggested that the man not return to work for at least three months, or until about August 18, 1950 (R. 159a). He also opined that the man would have a 10 per cent permanent disability (R. 159a). Dr. Farr merely examined and did not give any medical advice to the man (R. 165a and bottom R. 107a).

"Q. At any time did he say you were a well man? A. No he never said anything like that."

Petitioner went back to Mr. Mahoney and began settlement discussions (R. 106a). Mr. Mahoney sent Thompson over to one Barron of Shipowners Claims Bureau, an organization which adjusts claims for shipowners.

Mr. Barron in his discussions with Thompson, read that portion of Dr. Farr's report predicting a 10 per cent permanent disability (R. 260a). Thompson had his hospital discharge with him when he went to Barron. In the discussion, Thompson first demanded $15,000.00 (R. 259a). He

eventually agreed to $4,000.00 which included the advance of $300.00 for the Hot Springs, Arkansas trip. He then executed the release, which appears on R. 347a of the Appendix. The release contained a clause which reads as follows:

> "4. Regardless of what anyone may have told me I realize also that my injuries and illnesses and disabilities may have been, may be, or may turn out to be worse than they seem to be now, I am now settling for that too."

Prior to executing the release, Barron explained the alternative of suing to Thompson (R. 261a). He told Thompson that if he brought a lawsuit he may get more or less. Thompson had been going to sea for 40 years (R. 123a) and had settled claims prior to this. He had previously executed releases (R. 191a *et seq.*). He had previously employed attorneys (R. 192a). The trial court assumed (R. 207a) that the man knew what he was signing when he signed the release.

Much ado has been made about so-called misrepresentations of law and fact made by Barron to Thompson in their discussions. It is therefore necessary to quote from the record (R. 259a):

> "Q. Now you say you saw him twice. Would you concern yourself with the first meeting. Can you recall approximately how long it took? A. Yes, I can recall it very well. Mr. Thompson and I were in a particular room. He came over and talked about his claim at that time. He said at that time he wasn't feeling so very well. He did discuss settlement figures with me. We didn't get together exactly on anything at that time but Mr. Thompson thought it would be best for him if he went to Hot Springs, Arkansas, I think it was, and took some baths down

there. He said somebody had told him those baths would be beneficial to his well-being.

Q. Was any figure mentioned to you by Mr. Thompson at that first meeting? A. I think first he mentioned fifteen thousand and then he came down to six thousand."

(R. 260a):

"Q. Even at the second meeting did you have any discussion with respect to Dr. Farr's report with Thompson himself? A. Yes, I did. Well, as I remember it, Dr. Farr found he had a 10 per cent permanent disability of his body and I made that known to Mr. Thompson.

Q. How did you make it known to him? Did you read the report? A. I read that portion of the report to him, I think it was the conclusion that was found by Dr. Farr as I remember the report."

(R. 260a):

"Q. What went on at the second meeting? A. Well, Mr. Thompson came back, I presume from Hot Springs, Arkansas, where he had gone to take the baths, and we resumed discussion and he agreed to accept the four thousand dollar figure, I think it was, that I offered.

Q. And the release was entered into? A. And a release was entered into.

Q. Now, in this discussion as to amount to pay on the case, was there any consideration discussed of the period of disability, the period of maintenance? A. Well, there was a very brief period of maintenance, as I remember it, which didn't amount to anything, maybe to, roughly, about two hundred dollars.

Q. You mean for outpatient treatment? A. For outpatient care, and in our talk discussing the thing back and forth we discussed the possibility, of course, that if he could not substantiate his claim he would be entitled to no more than the two hundred dollars.

Q. You mean if he couldn't establish liability. A. That's right, yes. On the other hand, it was also discussed mutually between the two of us, the possibility of him getting more than four thousand dollars if he were able to substantiate the liability in court, if he got before—well, if the facts were such and the Court so found, he might get more than four thousand dollars, he understood.

Q. In other words, there was discussed the alternative to settling the case, that is, suing? A. Oh, absolutely. He told me he had seen lawyers and so forth, himself, and there was no question at that time that he didn't—*in fact, he told me certain lawyers expected to get, oh, much more than fifteen thousand that he originally mentioned.*" (Emphasis supplied.)

(R. 262a):

"Q. *Did you at any time tell him that he had completely recovered or that he was well?* A. *No, I did not.* (Emphasis supplied.)

Q. As a matter of fact, you told him what Dr. Farr said? A. I told him what the doctor told him and that was it. I am not a doctor and all I could tell him was what the doctor told him and let him make up his own mind."

(R. 263a):

"Q. Now, when Thompson came to you did you believe that he had a good case against the shipowners? A. I didn't believe he had a good case against the shipowners, no.

Q. Did you tell him that? A. I feel I probably—well, do you want a direct answer to that?

Q. Well, I don't care, direct or not. You and I are friendly enough so we don't have to have a quarrel. A. What we had, actually, was a discussion of the pros and cons rather than a directive from me that he was not entitled to a dime. We discussed the possibility of him not getting anything and we discussed the possibility of him making a

better figure than what I was willing to pay in settlement."

(R. 266a):

"Q. How did you make up this four thousand dollars? Tell us the workings—I won't want to go into your business because I know it's highly skilled and highly specialized business but, not telling any trade secrets, sir, how did you get—arrive at your four thousand dollar figure, or how was it arrived at? A. As I told you before, when I first discussed it with Mr. Thompson he made mention of the figure of fifteen thousand dollars which was the figure which he sought in order to settle the case. After discussing it with him, he came down to six thousand dollars. My thought was four thousand dollars because of this: in the first place he had something approximating two hundred dollars in maintenance, he had lost at that time about five or six months' base wages and overtime, which would have run about to two hundred and fifty, or maybe a little better a month, so his total special damages could not have been more than two thousand dollars, at tops, if, of course, there was any liability at all.

If there was no liability, he would be entitled to about, again about two hundred dollars, and that would be it. So, assuming there was, for the purposes of settlement, only that there was apart from liability in the case, he would get special damages which would make it about two thousand dollars. I realized, of course, that the cost of defending a case in court—I know it costs you money to hire lawyers and so forth. Mr. Thompson, himself, gave a figure of six thousand dollars as a figure which he would be willing to take right then and there, and he had, as he said, spoken to attorneys about the case and so forth. So I pointed out to him that if he were to accept four thousand dollars in settlement he would probably be saving some money for himself

because most attorneys, so far as I know, take at least one-third of any figure in settlement; some take forty per cent; some take fifty, but the average runs to about a third and if he were to take about four thousand dollars he would be getting as much with four thousand as if he had retained attorneys and paid an attorney the other two thousand dollars. I thought, too, if we were to pay over four thousand dollars it would be worth our while to go to court and fight the thing. All we could lose—well, we had a two hundred dollar item that we were going to definitely be out, as far as I knew, from there on it was a question of the jury to determine the amount of the man's damages, if he is entitled to any, and at that time it didn't appear to me there was too much liability on the ship's part."

(R. 268a):

"Q. Let me ask you this: is he alone in sending seamen to lawyers when he is going to try a case? Or let me put it this way: isn't it sort of the practice among you gentlemen who are in the underwriting business, or managing these cases for shipowners, when you get a case that involves some serious injury like knee injury, semilunar cartilage, or something like that, isn't it the usual thing to send that man to a lawyer before you settle with him? A. It certainly is not."

(R. 269a):

"Q. You knew, did you not, Mr. Barron, that this man had little education? A. No, he impressed me—I don't know how much formal education he had but he impressed me with being a highly intelligent person.

Q. Did you think at that time that he knew what was liability? A. I certainly did.

Q. There were forerunners of the Keen Case, weren't there? A. To my recollection, not, no.

Q. The Keen Case was not picked out of thin air, was it? A. Again, sir, you're asking me for my

opinion. My only opinion of the Keen Case is, of course, something that has nothing to do with it.

The Court: Well, all right, if neither of you knew the Keen Case then you were both going on the basis of a mutual mistake of law.

Mr. Hanrahan: The Keen Case wasn't decided then.

The Court: Then you were both going on the basis of a mutual mistake of law if the Keen Case is good law, and I think it is.

Q. Mr. Barron, you were mistaken in your views of whether or not there was liability in the set of facts such as this. A. No, I was not.

Q. Your thought then— A. I didn't bring this Keen Case into it, I mean in this conclusion. Now, I don't think I was wrong at that time because even under the circumstances as they were given to me this was not at all on all fours with the Keen Case in any manner, shape or form.

The Court: In your judgment.

The Witness: In my judgment, yes.

Q. In what way was it different? A. It was different in this respect: in so far as we know from information at hand——

The Court: Well, whether he thought it was or not is relatively immaterial.

Q. Now, Mr. Barron, there was, was there not— at least there was not a meeting of the minds. Let me put it this way. There was some mistake in your idea that there couldn't be any liability here. That is right, isn't it?

The Court: There might have been.

A. I didn't say there was no liability, I judged the both extremes: on the one side, none, and on the other side, full liability. Mr. Thompson did, too."

Thompson went back to work on July 21, 1950, more than one month ahead of Dr. Farr's prediction, and had been steadily employed for four years to the time of the

trial. (See record of employment according to Coast Guard records from 1948 to date, which begins on R. 334a.) (A close scrutiny of this employment record indicates that the period of Thompson's employment aboard an average vessel before the accident is about the same as after the accident. There are some voyages before and after which might only amount to one-half month, two months and in some instances five months, but the average both before and after the accident are virtually the same.)

The trial judge opined that the man was only able to work as a dishwasher. On the contrary, *the record indicates that he had frequently sailed at ratings higher than his job aboard the SS. Rosina Marron.* For instance, two years after the accident aboard the Grace Line's SS. *Santa Catalina,* he sailed as chief cook (R. 111a). Three years later in 1952 he was a chief cook on the SS. *Sea Glorius* (R. 188a). Actually, the first vessel that he sailed on as dishwasher was the Moore-McCormack SS. *Uruguay,* and this was only two months prior to the trial of this action in January 1954 (R. 226a, R. 227a). On the thirteen ships that he sailed on subsquent to the accident, *he passed physical examinations prior to employment, and during employment never made any complaints of physical disability* (see oral stipulation by petitioner's attorney beginning on R. 243a).

Subsequent to executing the release Thompson was treated at various marine hospitals on six occasions, *principally for causes unrelated to the accident of January 13, 1950* (Emphasis supplied). For instance, from February 16th to April 20, 1951, he was treated for a duodenal ulcer and urethritis (R. 321a). From June 11th to July 1, 1951, at the Baltimore Marine Hospital, he was treated for kidney trouble (R. 322a). Then again, at Stapleton, Staten Island, from February 13th to March 3, 1952 for a penal sore and

a duodenal ulcer (R. 324a). Again at Baltimore Marine Hospital from March 29th to April 9, 1952 for a prostate operation (R. 326a) and from November 13th to December 15, 1952 he was treated at the New Orleans Marine Hospital for an ulcer, a schizophrenic reaction, and a disease of the liver (R. 327a). Just prior to the trial of this action, he made two visits as an outpatient to the Stapleton Marine Hospital where he had a routine examination of the skull (R. 332a) and there was *no evidence of fracture or prolonged increased intercranial pressure.*

The record is barren of any evidence of treatment for encephalopathy subsequent to executing the release.

Summary of Argument.

The Respondent sustained its burden under the Garrett Rule in proving that the release was entered into by the petitioner voluntarily with full knowledge, with available legal and medical advice, with an adequate consideration and without coercion and duress on the part of the Respondent. To upset a release executed under the circumstances involved here would have a most detrimental effect on the expeditious, amicable adjustment that is now made of the majority of seamen's claims without recourse to the courts. The circumstances surrounding the execution of this release clearly indicate that Thompson voluntarily approached the Respondent and instituted negotiations. That he had full knowledge of what he was doing. That he had the best medical advice from the United States Marine Hospitals and while he did not have a lawyer, he had several offers which he declined and accordingly chose to handle the case himself. There was adequate consideration. In any event, Thompson settled a case of questionable liability.

ARGUMENT.

Respondent sustained its burden under the Garrett rule in proving the release was entered into by petitioner voluntarily with full knowledge, with available legal and medical advice for an adequate consideration and without coercion or duress on the part of the respondent.

A release is a contract. The entire business, economic and social structure of the civilized world is regulated largely by contracts. For this reason, the law is well settled that contracts will not be set aside except for specified reasons. The reasons are fraud or deception, duress or coercion, and mistake or otherwise put, executing without full understanding.

The specific law of releases concerning merchant seamen is actually the same law as above quoted. The leading case of *Garrett* v. *Moore-McCormack*, 317 U. S. 239, merely settled the point that the *burden of proof* in such cases shifted from the person seeking to set aside the release, to the person who set it up as a bar to a seaman's claim. The substantive points were not in any way changed by that decision, but have merely been put in the negative. It is respondent's burden to show that there was no fraud or deception, no duress or coercion, and that the seaman executed the release with full understanding of his rights. It is submitted that the respondent has adequately sustained this burden.

There is a tendency, however, in trying a personal injury case, such as this, to look upon the situation as it exists at the time of trial, as distinguished from the situation as it existed at the time the release was executed. This tendency is one to be guarded against.

In the *Garrett* case, the court stated (248):

> "We hold, therefore, that the burden is upon one who sets up a seaman's release to show that *it was* executed freely, without deception or coercion, and that *it was* made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman *at the time of signing the release* are relevant to an appraisal of this understanding." (Emphasis supplied.)

It will be seen from the foregoing quotation that this Court was interested in determining the validity of the release at the time of its execution, and at no other time. There is no rule of law which requires the respondent to prove that the consideration passed would be the same consideration that a jury might award to a plaintiff at the present time. It is sufficient that the seaman and the claim agent were dealing at arm's length and that a bargain was effected with full understanding on both sides.

Interesting language with respect to releases is contained in two Circuit Court decisions where certiorari was denied prior to rendering an opinion in the *Garrett* case.

In *Bonici* v. *Standard Oil*, 103 Fed. 2d 437, 308 U. S. 560, certiorari denied, the Court said:

> "Hence, while 'one who claims that a seaman has signed away his rights to what in law is his due must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman,' (*Harman* v. *U. S.*, 5 Cir., 59 F. 2d 372, at p. 373), nevertheless *a release fairly entered into and fairly safeguarding the rights of the seaman, should be sustained. Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regu-*

> *larly into the courts of admiralty.* Even if a seaman is the court's ward, the court cannot be always at hand to watch over him, for it can only move ponderously in a formal law suit. *Fair settlements are in the interest of the man, as well as of the employers.* This conclusion is substantiated by the fact that Congress when it legislated as to one form of releases, namely those for wages, nevertheless did so on the basis that the release was good until set aside, for it provided that 'any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require' (Act of March 4, 1915, chap. 153, Sec. 4, 38 Stat., 1164, 1165, 46 U. S. C. A., Sec. 597; *Pacific Mail Steamship Co.* v. *Lucas,* 258 U. S. 266)." (Emphasis supplied.)

In the second case, *Sitchon* v. *American Export Lines,* 113 Fed. 2d 830, 1940 A. M. C. 1292; 311 U. S. 705, certiorari denied, the Court said:

> *"If such a settlement as the one in the case at bar is voidable, no release by a seaman could ever be free from attack, if he subsequently discovered that his injuries were greater than he anticipated when executing the release.*
>
> "When a seaman has made a settlement after full investigation and with independent advice, we can see no ground for holding it invalid. The question in any case is whether the seaman, if he is acting alone, has intelligence enough to fully understand the situation and the risk he takes in giving up the right to prosecute his claim, or whether, if he is acting under advice, that advice is disinterested and based on a reasonable investigation." (Emphasis supplied.)

As a sidelight it should be mentioned here that while seamen are still "wards of admiralty", there has been a

great evolution since Justice Story defined that term in *Harden* v. *Gordon,* Fed. Case 6047 (CC Me 1823) and Jude Ware in The David Pratt, Fed. Case 3597 (DC Me 1839).

> "(Seamen) . . . are parties who do not stand in making their contracts, on even ground. Merchants are shrewd, careful . . . far-sighted in providing for their own interests; while seamen are ignorant, improvident and necessitous . . . wholly unable to defend their rights against the superior knowledge sagacity and wealth of their employers . . ."
>
> *The David Pratt, supra.*

They are still the wards of the Federal Courts but the days of Captain Bligh, shanghaiing and abandonment, are now ancient history. We are now in an era of great union activity wherein the seamen are very thoroughly indoctrinated with their rights, particularly those concerning illness, injury and wages.

Today, seamen are most cognizant of their position and aware of the effect of their joint action on such ponderous affairs as the National economy.

While seamen are still regarded as wards of the admiralty courts, and their interests are safeguarded in contractual matters, the courts have consistently held that their contractual obligations and responsibilities must be recognized when they have been fairly dealt with.

With the general rise in educational standards throughout the United States, the seaman today is on the average educated, literate, and fully capable of understanding and enforcing his rights.

The maritime unions keep their membership well oriented on their rights and employment conditions through booklets, pamphlets on the law applicable to seamen, and union newspapers. Some unions actually maintain an

educational division. The National Maritime Union employs counsellors to assist seamen in the handling of personal injury and wage claims. Today's seaman cannot be considered naive or credulous.

(a) Voluntarily executed:

The record of petitioner's testimony, his correspondence overwhelmingly indicate that Thompson took the initiative in the negotiations that culminated in the execution of the release.

In the Point San Pablo, 1940 A. M. C. 1004, 102 P 2d 412 (Dist. Ct. App. Cal. 1940) the injured seaman sent several letters to the shipowner in which he sought settlement. He instituted and entered into negotiations willingly. In sustaining the release, the Appellate Court said:

> "The record is totally bereft of any evidence that the appellant steamship company or its representatives did anything either to urge respondent to enter into negotiations for a settlement or to induce him to sign the release . . ."

Thompson's negotiations with respondent were most protracted as in the Point San Pablo, and also in *Harmon* v. *United States,* 59 Fed. 2d 373 (CCA 5th 1932) where the release was sustained. See also The Law of Seamen, Norris Vol. 1, Sec. 512 (1951).

(b) He Knew What He Was Doing:

Thompson's correspondence shows that he knew he had a fractured skull. His own doctor, Dr. Somberg, stated that the procedure at Marine Hospitals was to familiarize the men with their physical condition (R. 152a). Thompson had been going to sea for 40 years. He had used lawyers before, and he knew the nature and use of a release, for

he had claims before against steamship companies (R. 207a):

> "The Court: I'm going to assume, in the absence of further proof, that the man knew he was signing a release when he signed that paper."

Judge Knox of the Federal Court for the Southern District of New York had an interesting and applicable situation in *Little* v. *United States of America,* 1946 A. M. C. 611. Here, the seaman had a long and varied experience not only on sea but on land. He had had three falls down stairs on ships, three separate ships in a period of five years or thereabouts. After being hospitalized, he went on his own volition to the vessel's owners, and negotiated a release similar to releases that he had executed in the past. He was not represented by counsel, but negotiated with the claim agent or attorney for the company. In holding the release valid, the following colloquy was held between the libellant and Judge Knox:

> "The Libellant: When they settled with me there I didn't have any suspicion that I was going to have any trouble, to have my leg cut off or anything like that. I did not know that I was going to have a permanent trouble with my ears at the time, and I beg you——
>
> The Court: I quite agree that that may be entirely possible, but nevertheless you went there and you negotiated for a settlement, and it was made.
>
> The Libellant: I agree I signed it.
>
> The Court: And these documents, made by intelligent people, must have some recognition when they come into court. You may have made a bad bargain.
>
> The Libellant: Well, I did not know I would have to be put in this position.
>
> The Court: I am sorry, but that is the finding and judgment of the Court."

It is a most important consideration in this case that Thompson did admit that he previously executed releases.

> "The intelligence, literacy, amount of schooling and ability to understand the nature and character of his act in releasing his claim are generally carefully observed and weighed by the courts in determining the validity of a release given by a seaman. Where a seaman has sufficient intelligence to be capable of acting for himself; gives a release with full knowledge of what he is doing; has been apprised of all of his rights and has not been overreached—then such a release will be sustained. The fact that the seaman had previously acted for himself in negotiating and settling other claims with other shipowners, is often considered in determining that 'he knew what he was doing'."
>
> Norris, The Law of Seamen, Vol. I, Sec. 511.

(c) Available Legal and Medical Advice:

Thompson had repeated opportunities to retain counsel but expressed the desire to conduct negotiations himself. It would be absurd to think that the claim agent Barron had an obligation to send Thompson to a lawyer before talking to him.

> "The fact that libellant was without a lawyer to counsel him, alone is not enough to set aside this release in view of all the facts and circumstances disclosed."
>
> *Schlitzkus* v. *United States*, DC SD NY 1948, 1948 A.M.C. 688.

As for available medical advice; what could be more impartial than four different United States Marine Hospitals.

Dr. Farr was retained to assist claim agent Barron evaluate the case. Dr. Farr was more conservative than the United States Marine Hospital. The United States Marine Hospital at Stapleton, Staten Island, in their final discharge note, recommended only 30 days convalescence and stated that the prognosis was "good". Dr. Farr recommended 90 days convalescence and predicted that Thompson would have a 10% permanent disability. *At the trial below, there was absolutely no evidence offered that petitioner was permanently injured to any degree whatsoever.*

Thompson went back to work one month ahead of Dr. Farr's prediction and worked continuously for at least four years. There was intermittent treatment at United States Marine Hospitals for unrelated ailments. He passed a sign-on physical examination on thirteen vessels subsequent to the execution of the release and never made any complaint of disability on any of these vessels. There is no record of treatment for encephalopathy subsequent to executing the release.

Respondent was in no better position to evaluate this case than was Thompson.

An interesting comment by a lower court in a situation where the medical condition of a seaman changed for the worse after the signing of the release is *McGraw* v. *States Steamship Company*, 1954 A.M.C. 148:

> "The evidence at the trial established the fact that libellant took the initiative in suggesting a settlement. In the light of the known medical history at the time there was no overreaching on respondent's part. *Libellant McGraw, himself, obtained the abstract of the clinical record from the Marine Hospital* which showed that the libellant was then suffering from painless gross hermaturia—etiology

unknown. This record was further substantiated by the report from the Bluff Hospital, Yokohama, Japan, which was known to both parties.

"On February 21, 1952, based on the Marine Hospital report and that of the Bluff Hospital, libellant was paid maintenance to and including February 28, 1952, together with his unearned wages and transportation.

"Dr. Berger of the Marine Hospital confirmed the clinical reports, through a telephonic communication to the office of the claim agents, at which time libellant was present. *Respondent was in no better position to determine the clinical or medical facts than was libellant* and the future of the course of the case from a medical viewpoint was problematical and in the realm of speculation. The apparent kidney ailment might have corrected itself in a matter of weeks.

"Based on the information in possession of both parties, the settlement was a fair one and the consideration was adequate. Subsequent developments showing the need for extended medical treatment and care, were not anticipated by either party and do not control in determining the validity of the release. Any financial pressure which libellant was under at the time of settlement was not known to respondent's representative."

(d) Adequate Consideration:

A claim agent is certainly not to be held to be a prophet in addition to a medical expert and quasi-legal expert, nor is a merchant seaman. And yet, business must be transacted from day to day upon a recognition of things as they are. To disturb a contract as freely entered into as the one here presented would be to flood the courts with an ever increasing wave of cases, and do away once and for all with the very function of adjustment.

At the time the release was entered into, the claim agent considered that Thompson had a case of questionable liability. He also recognized the fact that only 30 days maintenance ($180.00) was due to the petitioner according to the Marine Hospital's discharge records and only 3 months maintenance according to the respondent's own Dr. Farr. He also recognized that the petitioner's lost wages for the 6 months disability only came to $1,500.00 (6 months at $240.00 a month). He also recognized that the medical condition of the petitioner could not be wholly accounted for by virtue of the accident, but was obviously and irrevocably tied up with petitioner's prior syphilitic condition, his duodenal ulcers, and other physical problems. If the claim agent sought to overreach this petitioner, (if such were possible, of which we are extremely doubtful), he would certainly not have offered the substantial sum of $4,000.00 in such a situation. The claim agent also recognized that a failure to compromise would result in a protracted lawsuit which would entail a substantial exposure to his employer. The generosity of the settlement was undoubtedly influenced by this fact.

It is respectfully submitted that the Circuit Court properly distinguished Thompson's circumstances from those involved in *German* v. *Carnegie-Illinois Steel Corp.*, 169 Fed. 2d 715 (1948) where the amount of consideration given for the release did not even equal the amount of accrued maintenance.

The amount of settlement that Thompson received was not such as could be said to "shock the conscience of the Court".

Ames v. *American Export Lines*, 41 F. Supp. 931 (DC SD NY 1941);

Stuart v. *Alcoa Steamship Co.*, 143 F. 2d 178 (CCA 2d 1944);
Schlitzkus v. *United States*, 1948 A. M. C. 688 (DC NY 1948).

(e) The Case at Best Was One of Questionable Liability:

Involved here is the principal question which we presume this Court considered of sufficient import to grant certiorari.

The District Court and the dissenting opinion in the Circuit Court thought claim agent Barron made a material though innocent misrepresentation of law when he told Thompson he had a weak case.

Barron was a claims adjustor whose position was to settle and adjust seamen's injury and wage claims. The settlement of these claims prior to suit served the necessary and advantageous function of avoiding time-consuming and expensive litigation.

He was not an attorney but his duties made him familiar to some degree, with the existing law applicable to seamen's claims.

Whether Barron was right or wrong, he did inform Thompson that he had the alternative of rejecting the offer and suing, that he might substantiate liability and get more than four thousand dollars. Thompson told Barrron that he had been to lawyers who assured him they could get more than the fifteen thousand he originally demanded (R. 261a and 262a).

As of June 2, 1950, the date of the release, the Courts had not yet spoken in *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515 (2 Cir., 1952) and *Boudoin* v. *Lykes Brothers*, 348 U. S. 336.

The applicable law as commonly understood at the time this release was excuted can best be summarized by quoting

a paragraph from The Law of Seamen, Norris, Vol. 2, Sec. 687 (1952):

> "Men engaged in the operation of a vessel on the high seas work under conditions of close confinement which tend to breed irritations and sharp tempers such as are not usually encountered in employment ashore. Unless the ship is a "happy" one, these differences in temperament often erupt into quarrels with the disagreements being settled by resorting to fisticuffs. When the assault is purely a private affair between fellow crewmen, no responsibility for the ensuing injury is placed upon the shipowner. But if one of the assailants is a person of *known vicious character* or one whom the master or officers should have known was of vicious character, then the injury inflicted by him is another matter." (Emphasis supplied.)

And in the 1954 Supplement to Vol. 2 of The Law of Seamen, Norris, page 37:

> "It has long been the rule that the vessel can be held liable for an assault upon a seaman when the assailing member of the crew *had been known, or should have been known by the ship's officers,* to be a person of violent or vicious disposition. *Keen* v. *Overseas Tankship Corporation* has dispensed with the necessity of knowledge of such propensities, at least where an insane or psychopathic individual is concerned and in effect has made lack of knowledge as indefensible to the shipowner as the starting of the ship's plates at the commencement of the voyage."

The emphasis in 1950 was on knowledge of the assailant's vicious nature, a factor completely absent with respect to Medina, except that he was effeminate.

At the time, Barron and Thompson evaluated this case in their 1950 conferences, they did not have the benefit of

knowing just what evidence would be offered or what facts would be established in the 1954 trial. For instance, Thompson could not know whether witness Schopf would voluntarily testify that the claimed homosexual incident never took place (R. 12a), nor whether the District Court would believe Thompson or Schopf.

It was doubtful in 1950 that the facts would constitute liability under the theory that this was an assault by a superior on an inferior in furtherance of the employer's business.

> *Alpha Steamship Corp.* v. *Cain* (1930), 281 U. S. 642;
> *Jamison* v. *Encarnacion* (1930), 281 U. S. 635;
> *Brailas* v. *Shepard Steamship Co.*, 152 F. 2d 849 (CCA 2d 1945);
> *Lykes Bros. Steamship Co.* v. *Grubough*, 128 F. 2d 387 (CCA 5th) 1942 M.O.D. 130 F. 2d 25.

In 1950, it could have been considered that this was a private brawl arising out of a personal grudge between assailant and victim, with no resulting liability on the part of the employer. See *Kable* v. *United States*, 169 F. 2d 90 (CCA 2d 1948); also see *Brailas* v. *Shepard* (*supra*), and *Lykes Bros.* v. *Grubough* (*supra*).

The requirement that the assailant be a person of known vicious character was well publicized in 1950 by the decisions in *Kyriakos* v. *Goulandris*, 151 F. 2d 132 (CCA 2d 1945); *Koehler* v. *Presque Isle Transportation*, 141 F. 2d 490 (CCA 2d 1944).

In Kyriakos, Judge Augustus N. Hand said:

> "Seamen have no legal power to rid themselves of dangerous shipmates. That power rests with the officers of the vessel. If the officers choose to continue to employ a man who is *known* or *should be*

> *known by them* to be a source of peril to those who sail with him, when measures which might reasonably be expected to prevent resulting injury are not or cannot be taken, a resulting injury to a member of the crew is one for which the person injured may recover under the Jones Act."

Even in *The Rolph,* 299 F. 52 (CCA 9th 1924), the case relied upon in the *Keen* decision, the assailant "was a man *known to be* (emphasis supplied) of a most brutal and inhuman nature, one known to give vent to a wicked disposition to assault sailors".

Indeed did not Judge Learned Hand admit that his approach was novel in deciding *Keen* v. *Overseas* when he said:

> "It is certainly possible to read that decision (*The Rolph*) as the Judge did in the case at bar; so as to limit the liability as to situations where the owner *knows* that the seaman is unfit."

Even in the *Keen* opinion, Judge Hand quoted two earlier cases which used language counter to that which he had held:

> *The E. B. Ward Jr.* (1883) 20 F. Rep. 702;
> *Hurley* v. *The Lizzie Frank* (1887) 31 F. Rep. 477.

Actually the *Keen* case pioneered the theory that a vessel is unseaworthy if it has aboard a seaman of vicious propensities, who does not add up to the ordinary measure of a seaman's calling, whether those propensities are known or unknown. It did not undertake to define just what it meant by a seaman of vicious propensities. It sent the case back to the District Court for a new trial, and it was settled. Actually, however, Judge Hand stated in his opinion, that all thoughout the case it was Keen's effort

to show that the assailant, Mruczinski, had been a drunken, dirty, quarrelsome seaman who was inherently dangerous and habitually had possession of deadly weapons. The plaintiff actually tried to prove that the assailant was insane.

The writer submits that it is most questionable whether a man such as Medina fits the definition of the individual involved in *Boudoin* v. *Lykes Brothers,* 348 U. S. 336 (1955). In Boudoin, the District Court thought that the assailant Gonzales, was "a person of dangerous propensities and proclivities"; "A person of violent character, belligerent disposition, excessive drinking habits, disposed to fights and making threats and assaults". The Court then went on to indicate that the definition it had in mind pertained to "A seaman with a wicked disposition, a propensity to evil conduct, a savage and violent nature".

This was not Medina. *True, he was effeminate, but was he actually a homosexualist?* Thompson's story of witnessing the homosexual act was not only uncorroborated, but denied by the alleged participant, Schopf. *However, presuming for the moment, that he was a homosexualist, will this Court go so far as to hold that a homosexual is per se a man of vicious propensities, a homicidal maniac, and that a ship which employs a homosexualist unseaworthy.*

Medina was employed aboard the SS. *Rosina Marron* for 6 months before Thompson ever came aboard. He was a good worker. He was popular. He played cards frequently with the crew and went ashore on leave with the crew. There was no record of his having any disagreements, quarrels, or arguments with anyone. His record with the United States Coast Guard was barren of any evidence indicating violence. He was in good standing with his union or he would not have been aboard the ship.

The deposition of Marvin Caplis appears in the record beginning on R. 17a. Caplis was the union delegate. He lived in the same room with Medina for about 8 months without incident. *He never saw Medina involved in nor was he approached by Medina with respect to homosexuality.* There was absolutely no evidence that Medina was prone to fights, drinking, or the carrying of dangerous weapons.

It is respectfully submitted that prior notice or indication to some person of a propensity or disposition on the part of Medina towards violence is a primary requisite in holding that Medina was a man of vicious propensities. That there was no prior notice or indication is concluded by the trial judge in his opinion ". . . Thus, his homicidal tendency had not appeared" (R. 23a). The trial judge concluded Medina to be a man of vicious propensities because of *the one and only assault on Thompson.*

The trial judge also admitted that mere effeminateness did not make a man violent;

> "Unless something serious cut across or invaded that area, he was not violent though effeminate."

Something more was necessary. That something, the trial court concluded, was the charge or accusation of homosexual acts which made him a "homicidal paranoiac":

> "But the charge against him of homosexual acts, whether true or false, did invade, and seriously, this very area of his delusion or aberration. This serious invasion of his delusional area made him the equivalent of a 'homicidal paranoiac', which the Keen case finds to be inherently dangerous to the ship."

Thus the court adjudicated, not only the fact of, but the type of Medina's alleged insanity without any psychiatric

examination and without Medina even being in court. The number of convictions for murder, in spite of pleas of insanity, would indicate that a murderer is not a "homicidal paranoiac" *per se.*

The word "propensity" is defined by Webster's Dictionary as "a natural inclination or bent; a favorable disposition, a like or bias." How can a bent, inclination, or disposition, vicious or otherwise, be determined without an objective appraisal of the subject's behavior patterns? If those behavior patterns were observed, and his experiences were void of past evidence of tendencies towards viciousness or violence, how can we say that the subject's personality has a vicious tendency, inclination or *propensity?*

One further word on homosexuality. If we put aside the natural abhorrence towards this disorder and examine it from an enlightened point of view, we would appreciate the fact that these individuals are not culpable. That homosexuality is due to a glandular imbalance is now common knowledge. Such individuals should not be denied the right of gainful employment because of an organic deficiency. *It can be argued that a homosexual has as equal a right to gainful employment as a diabetic.*

(f) In Any Event the *Boudoin* Case Cannot Have Retroactive Effect on a Contract Valid at the Time It Was Executed:

There is a general theory of law which is of assistance in demonstrating that the *Keen* or *Boudoin* cases cannot have any retroactive effect upon a contract which was valid at the time it was executed. If a person feels aggrieved by a judgment or final order in a case under the Federal Rules of Civil Procedure, either because of mistake, fraud, inadvertence, etc., he resorts to Rule 60(b) of the Federal Rules

which allows the court to set aside or modify such a judgment or order. It is abundantly established, however, that Rule 60 cannot be resorted to merely because of the fact that a subsequent decision has changed the law in respect of which the particular claimant's case had been decided. See:

Safeway Stores v. *Coe,* 136 F. 2d 771 (C. A. D. C.);

Lahman v. *Appleton Toy & Furniture Co.,* 148 F. 2d 998 (C. A. 7th);

Creedon v. *Smith,* 8 F. R. D., 162 (N. D. Ohio);

Phelan v. *Bradbury Building Corp.,* 7 F. R. D., 429 (S. D. N. Y., Goddard, J.) (and cases there cited);

Sunbeam Corp. v. *Charles Appliance,* S. D. 1953, 1199 F. Supp. 492.

Sympathy flows towards a person such as Thompson who has had such a harrowing experience, but let us reassure this Court that the circumstances surrounding the execution of the release have been thoroughly reviewed by the Circuit Court. The original three judges who heard the oral argument unanimously found the release valid. After re-argument before all seven judges, the release was again found valid with two judges who did not hear the oral argument filing a dissenting opinion.

WHEREFORE, it is respectfully submitted that the ruling of the Circuit Court for the Third Circuit be affirmed.

MICHAEL E. HANRAHAN,
Proctor for Respondent.

FILED
JAN 20 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No. 105

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Statement

Three features of Respondent's Brief so rebound against Respondent as to occasion this reply. They are: (1) Respondent's reliance on the terms of the release; (2) the "generosity", "adequacy" and "Ex post facto" arguments, and (3) the fallacious syllogism of Respondent's whole argument.

At trial Respondent's counsel stated: "First of all, from the defense point of view the most important thing here is the release" (R. 249a). In its Brief in Opposition (to the Petition for the writ here) Respondent stated: "The sole question involved is the validity of the seaman's release" (p. 1), and that the Court of Appeals "took the facts as determined by the District Court", but "held the release valid as a matter of law" (p. 2).

But whereas a seaman's release can be held *invalid* as matter of law, it cannot be held *valid* as matter of law, because of defendant's burden of proof under the *Garrett* case rule.

I

Because of its terms the release is void on its face.

Respondent now cites the full text and quotes clause "(4)" of the release in its Brief (p. 7).

The terms of the release (Ex. D-5 at R. 347a marked at R. 228a), however, make it void *on its face,* because of its recitals of:

1. Release by the seaman of "*rights* and claims . . . *not known* to me" and "even though I *do not know*" thereof. (Italics ours.)

2. Release by the seaman of "*every right or claim* which I now have or *may hereafter have* because of *any* matter or thing which happened before the signing of this paper"; and the commanded answer "Release of *everything*" at question "E". (Italics ours.)

3. Release of rights by the seaman "*without regard to anything that has been told me by anybody,*" "*Regardless* of what *anyone* may have told me", and "*all* this *regardless of what anyone* may have told me about my injuries, illnesses and *disabilities* or about *anything else.*" (Italics ours.)

4. That the seaman means "*everything* that is said on this paper" and that he signs the release "*because I am getting the money*"—an *unapportioned* recited sum of $4,000. (Italics ours.)

These provisions are completely, literally and in their tendency and effect incompatible with the "full understanding of his rights" required under *Garrett* v. *Moore-*

McCormack Co., 317 U. S. 239, 248, and the consequent duty of the releasee to explain and make these clear to the seaman.

To evidence compliance with the requirements of *Garrett* v. *Moore-McCormack Co., supra,* any such recitation (if made) must be of rights and claims *now* known to and fully understood by the seaman; with the release *limited* and *confined* to such only of the seaman's *present* rights and claims as he had been made to fully understand; and that the release was with due regard to the relations of the parties and to Respondent's duty to explain to the seaman his disability and rights, and WITH due regard (instead of "without regard") to respondent's representations and alleged belief and the seaman's consequent understanding thereof.

The release of rights "*not known* to me" is in contemptuous disregard of the requirement that rights released must be fully understood by the seaman.

The release of rights "*without regard* to" and "*Regardless* of" "*anything*" or "what *anyone*" may have told the seaman is both in contemptuous disregard of the required "full understanding" by the seaman of his rights, and a designed effort to license misrepresentation, deceit and fraud.

Of similar clauses designed to negative and prevent the showing of representations amounting to fraud, it has been said that:

> "It is difficult to conceive that such a clause could ever be suggested by a party to a contract, unless there were in his own mind at least a lingering doubt as to the honesty and integrity of his conduct".
>
> *Bridger* v. *Goldsmith,* 143 N. Y. 424, 428 (1894); *Strand* v. *Griffith,* 8 Cir. 97 Fed. 854, 858 (1899).

See also:

S. Pearson & Son, Ltd. v. *Lord Mayor of Dublin,* (1907) A. C. 351, 364-365.

And these cases further held that:

> "*Public policy* and morality are both ignored if such an agreement can be given effect in a court of justice . . . *Such a principle would in a short time break down every barrier* which the law has erected against fraudulent dealing." (Italics ours.)

Bridger v. *Goldsmith, supra,* 143 N. Y. 424, 428; *Strand* v. *Griffith, supra,* 8 Cir. 97 Fed. 854, 858-859.

As said in *Pearson and Son, Ltd.* v. *Lord Mayor of Dublin* (1907), A. C. 351, 360, 365:

> "Such a clause might in some cases be part of a fraud, and might disguise a fraud" (p. 360).

And "is a contract to submit to a fraud" (p. 365).

These principles are equally applicable to the law and *public policy* involved here.

In *Garrett* v. *Moore-McCormack Co., supra,* 317 U. S. 239 (1942), this Court stresses "Our *historic national policy,* both legislative and judicial" (317 U. S. 246), and "In keeping with this *policy*" (317 U. S. 247).

Garrett v. *Moore-McCormack Co.,* thus represents not only law but *public policy*—traditional, historic, repeated, persistent *national policy,* protective not only of the seaman but of the national welfare. The War of 1812 shortly before Mr. Justice Story's decision in *Harden* v. *Gordon,* 2 Mason 541, Fed. Case No. 6047 (1823), and the two world wars before this Court's 1942 decision in *Garrett* v. *Moore-McCormack Co., supra,* had shown the vital na-

tional necessity for a merchant marine manned, in peacetime and war, by seamen who could be confident that their meagre rights would be protected.

Approval by this Court of the form of seaman's release involved here "would in a short time break down" this public policy.

There is applicable also the principle unanimously stated by this Court respecting contracts affected by public policy, in the opinion by Holmes, J., in *Hazelton* v. *Sheckells,* 202 U. S. 71, 79 (1906), that:

> "The objection to them rests in their *tendency,* not in what was done in the particular case. Therefore a court will not be governed by the technical argument that when the offer became binding it was cut down to what was done and was harmless. The Court will not inquire as to what was done" (202 U. S. 79). (Italics ours.)

The Court cited *McMullen* v. *Hoffman,* 174 U. S. 639, 647, and *Weil* v. *Neary,* 278 U. S. 160, 173-174, in the latter of which this Court stated:

> "What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their *tendency* to evil in other cases" (278 U. S. 173). (Italics ours.)

Clearly the "*tendency*" the obvious design and purpose, and equally the "actual evil results" of a form of release such as this one, is to contract away and circumvent both the law and public policy of *Garrett* v. *Moore-McCormack Co., supra.*

Respondent's counsel states that 90% of seaman's cases are settled (R. 293a). If therefore, this form of release be approved, the 90% of injured seamen settling cases from day to day will be obliged to sign and be bound

by releases of "rights and claims . . . *not known to me*" and this "*without regard* to" and "*Regardless* of" "*what*" or "*anything*" that may be told him "by *anybody*" or "*anyone*" in procuring the release—this in direct violation of the law and public policy of *Garrett* v. *Moore-McCormack Co., supra.*

Three principal Maritime Circuits, the First, Second and Ninth Circuits, have held that *all* the various rights which a seaman's release is designed and purports to give up must be fully explained to and fully understood by him and that if the release recites or is broad enough to cover any rights not fully explained to and fully understood by the seaman, the release is void.

Bay State Dredging & Contracting Co. v. *Porter,* 1st Cir., 153 F. 2d 827, 829, 831, 832, 833-834 (1946);
United States v. *Johnson,* 9th Cir., 160 F. 2d, 789, 794, 795, 796 (1947);
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Waters v. *United States,* 9th Cir., 191 F. 2d, 212, 214, 215, 216-217 (1951).

In *Bay State Dredging & Contracting Co.* v. *Porter, supra,* the First Circuit approved the District Court's refusal to admit the release in evidence holding it void *as matter of law.*

In *Waters* v. *United States, supra,* the Ninth Circuit, reversing the District Court and holding a seaman's release invalid for failure of defendant to meet the burden of proving its validity, said:

> "It is clear that appellant understood he was releasing *all rights* but it is *not* clear that he understood *what* those rights were" (191 F. 2d 216). (Italics ours.)

Even the Third Circuit in *W. J. McCahan Sugar Refining & Molasses Co.* v. *Stoffel*, 41 F. 2d, 651, 653-654 (1930), held a seaman's release void on its face (*i.e.*, "Looking into the agreement," "whereby the appellant agreed" p. 653), "*because against public policy*" (p. 653), which, of four recited reasons, it considered "the one of capital importance" (pp. 653-654), saying:

> "If this contract were otherwise good it would still be bad *because opposed to public policy*" (p. 654). (Italics ours.)

Here, the release is no more a release of rights arising from a designated incident or from known or prognosed disabilities than of "rights . . . *not known*" to the seaman.

And as this Court unanimously held in *Hazelton* v. *Sheckells, supra*, 202 U. S. 71, 78 (1906), in an opinion by Holmes, J.:

> "Every part of the consideration goes equally to the *whole promise* and therefore, *if any part of it is contrary to public policy, the whole promise falls*" (202 U. S. 78). (Italics ours.)

Since both the law and public policy rule of *Garrett* v. *Moore-McCormack Co., supra*, is that the seaman must have "full understanding of his rights", and since not a dime or dollar of the consideration recited in this release can be separately ascribed to known rights, as distinct from "rights and claims . . . *not known to me*", or can be treated as paid *with* regard, as distinct from "*without* regard", to representations made to the Seaman, the whole release falls and is void *on its face* as matter of law.

II

The "generosity", "adequacy" and "ex-post facto" arguments of Respondent and of the majority below all serve to emphasize that respondent failed to explain to the seaman or allow any settlement value for Jones Act and unseaworthiness rights, and paid on the basis also of mistaken prognosis.

Nowhere in its brief does Respondent contend that a possible right to recover under the Jones Act or for unseaworthiness was explained to the seaman; nor was any part of the $4,000 paid in recognition and compromise thereof.

On the contrary, its "generosity", "adequacy" and "ex-post facto" arguments are based on its asserted belief (and representation) that no such rights existed. This argument, therefore, shows that such rights *were not even compromised.*

The attempt to justify the settlement as one of a "questionable liability" (Respondent's Brief, pp. 25-30) overlooks the fact that the pro and con aspects of any "doubts" compromised, were not as respects either Jones Act or unseaworthiness liability. Respondent's Brief now argues (p. 27) that "*It was doubtful* in 1950 that the facts would constitute" Jones Act liability, and, as respects unseaworthiness "In 1950, it *could have been considered* that this was a private brawl".

But this was not the explanation given to the seaman nor the subject matter compromised or paid for. The defendant represented and the amount allowed in settlement was based on the belief, that no such liability existed and nothing was in fact paid on any theory that such a liability might exist.

Hence, the now acknowledged compromisable "doubts" respecting this were "*not presented to the mind of the*

party interested." (*Harvey* v. *Cooke,* 4 Russ. Ch. 54 (1827)). To the same effect *Lawton* v. *Campion,* 18 Beavan's R. 87 (1854); *Cooper* v. *Phibbs,* L. R. 2 H. L. 149, 170 (1867). *Harvey* and *Lawton* held compromise releases invalid.

Harvey v. *Cooke* points out mistaken representation and failure to understand rights, and the *consequent* "most liberal provision" with which "*with that impression on her mind she could not fail to be well-satisfied*" (4 Russ. Ch. 56, 57).

In *Lawton* v. *Campion,* because a Court decision rendered "in another suit" between other parties two years after the compromise had been executed showed a mistaken legal basis for the settlement, the settlement was held not binding. The argument overruled is closely analogous to Respondent's argument respecting "*ex post facto*" effect of the *Keen* and *Boudoin* decisions.

The above cited decisions of three principal maritime Circuits have held that although a shipowner believes there was no Jones Act or unseaworthiness liability, it was the shipowner's duty, nevertheless, to explain fully to the seaman his possibility of having such rights, and to make the compromise with reference thereto, and that a release obtained without this is invalid.

Bay State Dredging & Contracting Co. v. *Porter, supra,* 1st Cir., 153 F. 2d 827, 829, 831, 832, 833-834 (1946);

U. S. v. *Johnson, supra,* 9th Cir., 160 F. 2d 789, 794, 795, 796 (1947);

Muruaga v. *U. S., supra,* 2nd Cir., 172 F. 2d 318, 320-321 (1949);

Mavromatis v. *United Greek Shipowners Corp., supra,* 1st Cir., 179 F. 2d 310-317 (1949);

Waters v. *United States, supra,* 9th Cir., 191 F. 2d, 212, 214, 215, 216-217 (1951).

In *Bay State Dredging & Contracting Co.* v. *Porter,* the Court stated that cross-examination showed that:

> "the agent had only the foggiest notion of what plaintiff's rights were; and even if he had attempted to do so, he could not have explained plaintiff's rights with any approach to accuracy" (153 F. 2d 831).

This is true of agent Barron here as respects either Jones Act or unseaworthiness rights. But in addition Barron here affirmatively represented that the petitioner had no such rights.

Moreover, whether or not Dr. Farr himself stated his mistaken prognosis to petitioner, Barron admittedly did. And Mahoney told him no more would be paid "because you are well" (R. 106a, 107a).

These very points of mistake in both law and prognosis are the only possible justification for Respondent's present arguments of "generosity", "adequacy" and "ex post facto"; and the arguments do not refute but themselves further confirm the mistaken basis for the release.

III

The argument that respondent "sustained its burden", even if true, could not justify a reversal of findings not clearly erroneous. Neither respondent nor the majority below have urged nor can they show that the findings are clearly erroneous.

Respondent's whole argument consists of a contention that Respondent "sustained its burden under the *Garrett* rule" (Respondent's Brief, pp. 14, 15, *et seq.*). Even less affirmatively the majority opinion below reversing plaintiff's judgment states:

> "We cannot say that defendant has *failed* to show an absence of coercion" (221 F. 2d 561; Petition, p. 10a).

Respondent argues that "to upset" the release (Respondent's Brief, p. 14) "to *set aside* the release" (Id., p. 15) "to *disturb* a contract" (Id., p. 23) "which was *valid* at the time it was executed" (Id., p. 31) involves the same principle as "to *set aside* or modify . . . a judgment or order" (Id., pp. 31, 32). In similar vein the very holding of the majority below was that, "We are of the opinion that the District Court committed error in *striking down* this release" (221 F. 2d 560; Petition, p. 9a). Compare the dissenting judges' statement that "We think the release executed by Thompson *was invalid*" (221 F. 2. 562; Petition, p. 1a) and the District Court's holding that "The release accordingly is *no bar*" (110 F. Supp. 845; Petition, p. 24a).

State Respondent's argument in whatever form of syllogism, its major premise, minor premise, and conclusion are erroneous. It is premised on the theory that the release has a *prima facie* validity, contrary to the burden of proof rule of *Garrett* v. *Moore-McCormack Co., supra.* And it is further premised on the theory that if a party sustains its burden of proof, this eliminates instead of presenting an issue of fact, contrary to the issue of fact rule of *Callen* v. *Pennsylvania R. R. Co.*, 332 U. S. 6 (1948).

In *United States* v. *Jefferson Electric Manufacturing Co.*, 291 U. S. 386, 407, 408-409 (1934), this Court held that where as here a jury is waived the Court exercises "the functions of a jury and its findings are on the same plane as if embodied in a jury's special verdict" (291 U. S. 407), and that:

> "Saying that the plaintiff *has sustained the burden of proof* . . . is not an adequate *finding* of the matters of fact involved . . . *it does not adequately respond to the issue.*" (291 U. S. 408, 409) (Italics ours.)

Under *Garrett* v. *Moore-McCormack, supra,* it is not for the seaman to "upset", "set aside" or "disturb" a release; the burden is on defendant to prove its validity.

Unless defendant "sustains" its burden, the release must be held invalid as matter of law; if defendant "sustains" its burden, a question of fact arises.

In *Bay State Dredging and Contracting Co.* v. *Porter, supra,* 1st Cir., 153 F. 2d, 827, 833-834, where (as here) the defendant's agents "Admittedly . . . made no such disclosure" to a seaman of his possible Jones Act and unseaworthiness rights, the Court said:

> "Defendant utterly *failed to lay the necessary factual foundation* upon which the validity of the release could have been submitted, with appropriate instructions to the determination of the jury" (153 F. 2d 833-834). (Italics ours.)

It therefore affirmed the District Court's refusal to admit the release in evidence.

In *Waters* v. *United States, supra,* 9th Cir., 191 F. 2d, 212, 217, reversing a judgment for defendant which had sustained a seaman's release, the Court said:

> "However, on the record before us we are of the view that appellee *failed to meet the burden imposed upon it by law and the release must be held invalid*" 191 F. 2d 217). (Italics ours.)

In *Muruaga* v. *United States, supra,* 2d Cir. 172 F. 2d, 318, 320, reversing a judgment for defendant which had sustained a seaman's release, the Court said:

> "The appellant understood when he signed the release that he was ready for work and hoped to be re-employed. The finding that he executed the release with adequate knowledge of his condition and

his legal rights must be set aside as *clearly erroneous.*" (172 F. 2d 320). (Italics ours.)

Assuming, therefore (although it clearly was not so) that defendant "sustained its burden" or has not "failed" to sustain its burden, this could not justify the reversal of the District Court's judgment; for there still remained the District Court's findings of fact, which were not clearly erroneous. In *Callen* v. *Pennsylvania R. R. Co., supra,* the burden of proof was the other way. But the *Callen* decision clearly establishes that where the party having the burden met that burden, it was error to rule in his favor as matter of law, rather than treating the question then as an issue of fact.

Respondent's very syllogism thus is erroneous; its whole argument offers no basis whatever for sustaining the reversal of the District Court judgment by the Court of Appeals.

Respectfully submitted,

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Office - Supreme Court, U. S.
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No. [redacted] 1

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION OF PETITIONER FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No. 105

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION OF PETITIONER FOR REHEARING

Petitioner, William Thompson, a disabled American seaman, respectfully petitions for rehearing in the above entitled matter.

Statement

Petitioner, a seaman, second cook, on respondent's tanker "Rosina Marron", on the night of January 13, 1950, was murderously assaulted on shipboard by another member of the crew, who struck him three blows over the head with a meat cleaver, cutting through both tables of petitioner's skull, and creating an injury diagnosed by two hospitals

and found by both lower courts to be "encephalopathy due to trauma", meaning brain damage due to a blow, or disease of the brain caused by wound or injuries.

In an action for damages in United States District Court, District of New Jersey (Hartshorne, D. J.), plaintiff recovered judgment for $16,000, *i. e.,* $20,000, less $4,000 credited as previously paid. A release once pleaded in an answer (R. 5a-7a) to an original complaint (R. 3a-5a), then not pleaded in the answer to amended complaint (R. 29a-32a), but orally claimed at trial (R. 42a) as "the most important" defense (R. 249a), was held invalid on the proofs.

Respondent appealed to the United States Court of Appeals, Third Circuit. By opinion reported at 221 F. 2d 559, said Court reversed on the ground the release was binding on the seaman. On petition for rehearing before that Court *en banc,* such decision was adhered to, with two judges dissenting.

The seaman's petition for certiorari was granted October 10, 1955 and assigned to the summary calendar. On November 14, 1955, this Court made an order granting petitioner's motion to waive the printing of the record. It would appear that on both occasions all of the nine Justices of the Court participated.

The case was orally argued on January 24, 1956 before a bench of eight Justices, Mr. Justice Harlan not being present.

A judgment of affirmance by an equally divided Court was entered January 30, 1956, six days after argument.

Grounds For Rehearing

1. The two lower Courts, reciting the same evidentiary or subordinate facts (cf. *Offcutt* v. *United States,* 348 U. S. 11, 15 (1954)), and each in effect conceding the basic facts

relied on by the other, have adopted opposite legal tests of the validity of a seaman's release, with opposite results to the parties.

In holding the release invalid, the District Court relied on *mistake,* plus *mistaken representations.*

In holding the release valid, the Court of Appeals relied on *lack of coercion* and *lack of intentional misrepresentations.*

The District Court conceded there was no coercion nor intentional misrepresentation by respondent's agents, but held the release invalid because it was made under *mistake* of both fact and law, and was procured by *"incorrect though not intentionally false statements of both fact and law"* by respondent's agents to an ignorant seaman while still suffering from the effects of a split skull, brain damage and psychoses, and without legal or independent medical advisers of his own.

The Court of Appeals recited in substance the same mistakes, the same incorrect though not intentionally false statements to the unrepresented seaman as were relied on by the District Court, but reversed because there was no coercion nor *intentional* misrepresentation. Indeed, the Court of Appeals *excused and justified* the claim agent's representations as representations which, "being grounded on available and honestly entertained opinion, cannot be made the basis for nullifying this settlement". It further *excused and justified* Dr. Farr's mistake by an equivalent and concurrent mistake of the Staten Island Marine Hospital, with both serving to *excuse and justify* the claim agent's *mistaken* representations. Although the Court of Appeals never once used the word mistake, its decision means that a seaman's release is binding notwithstanding that it is based on *mistake;* for *mistake* (as distinct from fraud) presupposes "honestly entertained opinion".

This presents directly the tremendously important question whether a seaman's release is to be held binding notwithstanding the District Court's finding, supported by both parties' evidence and contentions and not disturbed but in effect confirmed by the Court of Appeals, that the release was based on *mistake* of his rights and disability, plus *mistaken representation* thereof to the seaman by respondent's agents who procured the release. Is it essential that a seaman prove and the Court find *intentional misrepresentation* by respondent's agents in order to invalidate a seaman's release? Or is gross *mistake* and *mistaken representation* of his disability and rights incompatible with the "full understanding of his rights" required to be proved by respondent to validate the release under *Garrett* v. *Moore McCormack Co.*, 317 U. S. 239, 248 (1942)?

As further excuse and justification—as in effect providing the element of "legal advice available to the seaman at the time of signing the release" (*Garrett* v. *Moore McCormack Co., supra,* 317 U. S. 239, 248)—the Court of Appeals cited attempts of attorneys or their solicitors to solicit his case during his hospitalization. The importance of this as implying that a seaman who rejects the solicitations of ambulance chasers and trusts his employer does so at his peril is enhanced by this Court's affirmance by equally divided Court.

The District Court also held the consideration grossly inadequate for the seaman's rights and damages *established at the trial.* The Court of Appeals applied a different test. It held the consideration adequate or "generous" for the rights and damages *believed at the time of settlement.* Under the District Court's theory there is, but under the Court of Appeals' theory there can never be, inadequacy by reason of *mistake* of rights and disability.

This presents directly the tremendously important question whether both "full understanding" and "adequacy of

consideration" required under *Garrett* v. *Moore McCormack Co., supra,* 317 U. S. 239, 248 (1942) are to be emasculated and defeated in the lower Courts by the simple device of determining adequacy by the *mistaken* and *misunderstood* rights rather than by the *fully understood* rights when the *mistake* of rights is discovered.

It is impossible to read the opinions of the District Court and Court of Appeals, in the light of this Court's affirmance of the latter by equally divided Court, without realizing that an early conflict which had largely abated in lower Courts has been emphatically revived by this decision, and a question mark emphatically placed on the great body of decisions holding releases invalid for *mistake,* and even on all law respecting relieving from *mistake.*

So far as we have been able to find, this Court has never hitherto held or indicated, even by equally divided Court or dissenting opinion, nor even respecting people on equal footing and dealing at arms length, that *mistake* cannot be relieved against equally as fraud or coercion, or that *mistake* is compatible with "full understanding".

In *Callen* v. *Pennsylvania R. R. Co.,* 332 U. S. 625 (1948) this Court held, at least indirectly, that "*mistake* as to the nature and extent of the injuries" (332 U. S. 628-629) may be a basis for avoiding a release even where plaintiff had the burden of proof.

But this Court appears never to have settled specifically the fifty-year conflict whether mistake of *prognosis* represents mistake of fact incompatible with "full understanding" so as to invalidate a release. Conflict in the Circuits appears to have commenced with *Lumley* v. *Wabash R. Co.,* 6th Cir., 1896, 76 Fed. 66 (Taft, Lurton and Hammond, JJ.) and *Great Northern Ry. Co.* v. *Fowler,* 9th Cir., 1905, 136 Fed. 118, holding releases no bar, and *Chicago & N. W. Ry. Co.* v. *Wilcox,* 8th Cir., 1902, 116 Fed. 913, holding that "a mistake as to the future effect of a personal injury can-

not have this effect" and reversing *Wilcox* v. *Chicago & N. W. Ry. Co.*, 111 Fed. 435, which had held the contrary. All were cases in which plaintiff had the burden of proof.

The conflict is discussed in *Thompson* v. *Camp*, 6th Cir., 1947, 163 F. 2d 396, 400-401.

Of the Circuits which have passed on the question, the majority have disapproved, ignored or distinguished in a manner amounting to disapproval the Eighth Circuit decision in the *Wilcox* case. And even the Eighth Circuit, in *Lion Oil Refining Co.* v. *Albritton*, 8th Cir., 1927, 21 F. 2d 280, held that an injured releasor had a right to rely on the company doctor's statement that his sight was not affected; if the statements were knowingly false, the release was secured by fraud, but *"If the statements were the honest belief of the doctor . . . there was mutual mistake,"* and *"In either case"* the District Court was warranted in holding the release invalid (21 F. 2d 282).

The preferred view, in accord with most of the Circuits, is stated by Judge Learned Hand in *Scheer* v. *Rockne Motors Corporation*, 2d Cir., 1934, 68 F. 2d 942, 945 (L. Hand, Swan and Chase, JJ.), and by Judge Augustus N. Hand in *Ciletti* v. *Union Pac. R. Co.*, 2d Cir., 1952, 196 F. 2d 50, 52:

> *"There is indeed no absolute line to be drawn between mistakes as to future, and as to present facts.* To tell a layman who has been injured that he will be about again in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it is ordinarily more than a forecast; it is an assurance as to his present condition, and so understood." (Italics ours.)

The conflict, hitherto greatly ameliorated both by weight of the opinions of the principle Circuits and by this Court's

decision in *Callen* v. *Pennsylvania R. R. Co., supra,* and substantially abated by the Eighth Circuit's own decision in *Lion Oil Refining Co.* v. *Albritton, supra,* was given ominous renewal by the Third Circuit's decision herein, which used in this *seaman's* case almost precisely the discredited 1902 argument of the Eighth Circuit in the *Wilcox* case. .

Surely, this question should be settled, instead of risking—indeed, almost assuring—that an inconclusive and divisive disposition of this case give unwonted impetus to the revival below of an outmoded conflict which time cannot further illumine.

The greatest difficulty encountered by Petitioner's counsel in the Court of Appeals and here is one of perspective: Respondent's counsel arguing lack of coercion, fraud or intentional misrepresentation where none is claimed, and the inability of Petitioner's counsel to focus attention of the appellate Courts upon the issue of *mistake* determined by the District Court and not disturbed but in effect confirmed by the Court of Appeals.

Viewed out of perspective, or as related to fraud or intentional misrepresentation, the Staten Island Marine Hospital record of first discharge after four and a half months in marine hospitals (Pl's. Ex. 2, R. 319a), at no cost to Respondent, of course tends to disprove *intentional misrepresentation.* But in proper focus, related to the real issue of *mistake,* it simply further and strongly *confirms mistake.* Dated April 28, 1950, it "estimated" he would be fit for duty May 29, 1950, five days before the June 2, 1950 release was signed. But four years later Dr. Farr's own X-ray experts found the 1950 vertical fracture still unhealed (R. 162a).

Marine Hospital Dr. Somberg showed that such of the later records as failed to mention encephalopathy, which

was incurable, did not negative Petitioner's suffering therefrom, these records being concerned with what could be treated and cured (R. 154a-155a). Respondent contended it was the seaman's "hard luck" if he mistakenly "thought he was cured" when he signed the release (R. 51a).

Also the convenient decision in *Keen* v. *Overseas Tankship Corp.*, 2d Cir., 1952, 194 F. 2d 515, viewed with relation to a non-existent question of fraud or intentional misrepresentation, may tend by its date to disprove intentional misrepresentation. But in proper focus, related to the issue of *mistake,* both it and this Court's later decision in *Boudoin* v. *Lykes Bros. Steamship Corp.,* 348 U. S. 336 (1955), conclusively establish *mistake* and misstatement by claim agent Barron of the law. To use them to prove fraud would doubtless give them *ex post facto* effect. But as confirming *mistake* they serve merely as convenient and conclusive evidence. Suppose *Keen* had not been decided before Petitioner's case, and the *Keen* ruling had been made in Petitioner's case instead. The *mistake* of what Barron told Petitioner as to the law would be no less actual. In *Waters* v. *United States,* 9th Cir., 1951, 191 F. 2d 212, and *United States* v. *Johnson,* 9th Cir., 1947, 160 F. 2d 789, there was no convenient decision, but nonetheless a failure through mistake to correctly explain to the seaman all of his legal rights. The fact that the *Keen* case was available here as convenient proof should be taken as conclusively establishing the *mistake* of law.

The questions presented by Petitioner were of tremendous importance for decision by this Court, when the petition herein was filed and the writ granted. The importance of their decision has been increased rather than left as before by this Court's equal division affirmance. Respondent's counsel stated that 90% of seamen's cases are settled (R. 293a). But with the law made increasingly uncertain rather than determined by this Court's equal

division decision, injured man and insurer alike will be unwilling to negotiate. Injured persons will feel they can rely upon nothing told them, but *must* hire lawyer and doctor; claim agents will not know whether or how far they are responsible for "full understanding." Lower Courts, moreover, will be at a loss to know how to decide cases before them. And this will extend to all fields where releases are involved. The energy expended by this Court herein thus far not only will have gone for naught; the situation actually will have been worsened. "Knowledge" to all should be afforded by this Court settling this question of public policy (cf. *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 709-710 (1945)).

2. We appreciate that rehearing is discretionary with the Court. But the writ of certiorari, which also is discretionary, is granted to secure uniformity of decision and settle important questions of law, and not for the benefit of a particular litigant.

> *Magnum Import Company* v. *Coty*, 262 U. S. 159, 163 (1923);
> *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U. S. 70, 74 (1955).

A decision by an equally divided Court, though binding on the parties, settles no point of law.

> *Etting* v. *The Bank of United States*, 11 Wheat. (24 U. S.) 59, 78 (1826);
> *Washington Bridge Co.* v. *Stewart*, 3 How. (44 U. S.) 413, 424 (1845);
> *Hertz* v. *Woodman*, 218 U. S. 205, 212-214 (1910).

This Court throughout its history accordingly has sought to avoid rendering equally divided Court decisions except in cases of necessity.

Mayor of New York v. *Miln,* 8 Pet. (33 U. S.) 120, 122 (1834);
Rice v. *Sioux City Memorial Park Cemetery, supra,* 349 U. S. 70, 73, 79 (1955).

Since the days of Chief Justice Marshall, continuing through the past term, this Court has exercised its discretion to grant rehearing where equal division of the Court has prevented the settling of important questions, particularly when there is available an additional Justice to insure breaking the apparant deadlock in the Court.

Mayor of New York v. *Miln,* 8 Pet. (33 U. S.) 120, 122 (1834), where two Justices "were absent when these cases were argued"; 9 Pet. (34 U. S.) 85 (1835), where there was a vacancy due to death; decided 11 Pet. (36 U. S.) 102 (1837) by full bench;
Commercial Molasses Corp. v. *New York Tank Barge Corp.,* 313 U. S. 541, 596, affd. on rehearing 314 U. S. 104;
Toucey v. *N. Y. Life Ins. Co.,* 313 U. S. 538, 596; revd. on rehearing 314 U. S. 118;
N. Y., Chicago & St. L. R. R. Co. v. *Frank,* 313 U. S. 538, 596, affd. on rehearing 314 U. S. 360;
Gray v. *Powell,* 312 U. S. 666, 313 U. S. 596, revd. on rehearing 314 U. S. 402;
Baltimore & Ohio R. R. Co. v. *Kepner,* 313 U. S. 542, 597, affd. 6-3 on rehearing 314 U. S. 44;
Bernards v. *Johnson,* 313 U. S. 537, 597, affd. unanimously on rehearing 314 U. S. 19;
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Bruice's Juices v. *American Can Company,* 327 U. S. 758, 812, affd. on rehearing 330 U. S. 743;
MacGregor v. *Westinghouse Electric & Mfg. Co.,* 327 U. S. 758, 812, revd. on rehearing 329 U. S. 402;
Rice v. *Sioux City Memorial Park Cemetery,* 348 U. S. 880 (1954), dismissed on rehearing 349 U. S. 70 (1955);
Ryan Stevedoring Co. v. *Pan-Atlantic Steamship Corp.,* 349 U. S. 901, 926 (1955), affd. on rehearing 100 L. ed. adv. ops. 146 (1956);
Indian Towing Co. v. *United States,* 349 U. S. 902, 926 (1955), revd. on rehearing 100 L. ed. adv. ops. 83 (1955).

Formerly, equal division of the Court was not reported until it had been ascertained after intensive study of the case and the briefs of the parties by the whole Court that "Consequently, the principles of law which have been argued *cannot be* settled" (*Etting* v. *The Bank of United States, supra,* 11 Wheat. (24 U. S.) 59, 78 (1826)). We appreciate that the volume of the Court's business today necessitates a more summary administrative rule; and that "the equal division of the Court *forestalled* that intensive study attendant upon opinion writing" (*Rice* v. *Sioux City Memorial Park Cemetery, supra,* 349 U. S. 70, 75 (1955)). On rehearing the decisions of unanimous affirmance in *Bernards* v. *Johnson;* affirmance 7-2 in *Lisenba* v. *California;* affirmance 6-3 in *Baltimore & Ohio R. R. Co.* v. *Kepner,* and the decision of *reversal* 8-1 in *Halliburton Oil Well Cementing Co.* v. *Walker* necessarily invoved changes of opinion after intensive study. And the *reversals* in *Toucey* v. *N. Y. Life Ins. Co.; Gray* v. *Powell; MacGregor* v. *Westinghouse Electric & Mfg. Co.* and *Indian Towing Co.* v. *United States, supra,* notwithstanding prior equal division affirmance, further show the importance of rehearing before a full bench.

For this reason and because there also is a ninth Justice available to break any deadlock, we respectfully submit, rehearing is eminently desirable both because of the tremendous importance of the questions involved, and also because both the guardianship theory and the "clearly erroneous" rule afford strong reason for reexamining what amounts in effect to having overturned by equally divided Court the conscientious determination of the primary guardian District Court in favor of the seaman ward.

We appreciate, of course, that this Court's equal division decision formally affirmed the Court of Appeals' reversal rather than this Court itself reversing the District Court. But the practical as distinct from technical effect, we submit, is the same as though this Court by equal division had itself *reversed* the guardian District Court.

The Court of Appeals' decision took no account of Rule 52(a) and this Court's holding in *McAllister* v. *United States,* 348 U. S. 19, 20 (1954) that:

> "the Court of Appeals may not set aside the judgment below unless it is clearly erroneous" (348 U. S. 20).

If the Court of Appeals "departed from this standard" (348 U. S. 20), it is *only* this Court which has decided the clearly erroneous question and this by equal division. If the Court of Appeals did not depart from this standard, this Court, nevertheless, also has determined by equal division whether the District Court's findings are clearly erroneous, under the *McAllister* rule that:

> "In relation to the District Court's findings we stand in review *in the same position as the Court of Appeals.* The question, therefore, is whether the findings of the District Court are clearly erroneous" (348 U. S. 20-21).

Either way, this Court in effect has overturned by equal division the District Court determination.

Bearing in mind that seamen are not ordinary litigants but "are emphatically the wards of the admiralty" (*Garrett* v. *Moore McCormack Co., supra,* 317 U. S. 239, 246), whose contracts, especially their releases are "subject to careful scrutiny" (317 U. S. 248), a grave question is presented whether decision by equally divided Court should ever go *against* the seaman ward, particularly when there is a ninth Justice to insure breaking any continued deadlock, and the rehearing before a full bench will permit the intensive study which was forestalled by the even division of the Court. Whether the District Court be held sole guardian, or primary guardian with this Court the Supreme guardian, surely the question whether the primary guardian's determination is to be approved or disapproved warrants reconsideration, where decision by even division for administrative reasons only, operates *against* rather than in favor of the Court's ward.

Thompson, the petitioner, was a simple minded negro, born in Georgia, who was a member of the old Seamen's Union. Thompson had a natural aversion to lawyers who offered unsolicited advice. He, like many other seamen, believed in the "company." While plaintiff's action was at common law, plaintiff on counsel's advice waived a jury in order to avoid delay in the trial. The substantive law of the sea is the same whether the case is tried at law or in admiralty. Judge Hartshone has shown by the record that he heard every bit of evidence at the trial and questioned each witness. He ascertained exactly what took place at the time when the release was executed and concluded that the seaman had underestimated by far the nature and extent of his injury and his legal rights.

The fact that he had gotten an advance of $300 from the claim adjuster and made a trip to Hot Springs, Arkansas where he bathed in the hot springs, made him feel so much better that he thought he was cured, and this belief was further induced both by the Staten Island Hos-

pital estimate on April 28, 1950 that he would be fit for duty by May 29, 1950, and by agent Barron telling him Dr. Farr's May 18, 1950 prognosis of three months' disability. The District judge was acting in place of a jury and he was acting as the "guardian of his ward," a seaman.

Whether the seaman's release is before a United States District Judge sitting in admiralty or at law as jury and court, he is exercising the *power of a guardian* and his judgment of facts and conclusions of law should not be disturbed, unless he *has abused his discretion.*

We have never seen a record wherein a judge more thoroughly and competently interviewed witnesses and appraised evidence than did Judge Hartshone in trying this case. The Court's relation to the seaman as guardian, and the District Court's function as guardian to jealously guard the seaman's rights should not be jeopardized by an equal division decision forestalling careful study of the record on which the guardian District Court acted, and careful appraisal of the completely different perspective indicated by the opinions of the District Court and Court of Appeals.

Wherefore, petitioner respectfully prays that a rehearing be granted herein, and that the judgment of the Court of Appeals be reversed and the judgment of the District Court reinstated and affirmed.

Respectfully submitted,

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Certificate of Counsel

SILAS B. AXTELL, counsel for the above-named petitioner, does hereby certify that the foregoing petition and application is presented in good faith and not for delay.

SILAS B. AXTELL,
Counsel for Petitioner.

FILED
SEP 22 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. [redacted] 1

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

BRIEF FOR RESPONDENT ON REHEARING.

At this point, the Respondent does not wish to unnecessarily burden this Court with a lengthy brief on the law but wishes the Court to refer back to its original brief filed before the original argument and merely stress certain highlights, and reply to the two principal issues mentioned by the Petitioner in his petition for rehearing.

On this rehearing, the Respondent respectfully submits that the Court has already adequately laid down the rules for determining the validity of a seaman's release in *Garrett* v. *Moore-McCormack*, 317 U. S. 239 and we urge the Court to reiterate that holding and to affirm the Third Circuit Court's opinion that there was compliance with the rules established therein at the time petitioner executed his release for $4,000.00.

For this Court's convenience, it would be well to summarize here Justice Black's ruling in the *Garrett* Case as the Third Circuit did in its opinion below, 221 F. 2d 559:

"From that case the following principles emerge:

(1) The burden of proving the validity of a release rests upon one who sets up the release and this burden can be carried only by showing that 'it was executed freely without deception or coercion.' 317 U. S. page 248, 1942 A. M. C. page 1651).

(2) The release must be shown to have been fairly arrived at and made by the seaman with a full understanding of his rights.

(3) "The adequacy of the the consideration and the nature of the medical and legal advice available to the seaman *at the time of signing the release* are relevant to an appraisal of this understanding." (Emphasis supplied) (317 U. S. page 248, 1942 A. M. C. page 1652).

Viewed by these standards we think the release here in issue is binding."

While this Court is concerned principally with questions of law, it is necessary in this instance to review the many facts surrounding the execution of the release in order to determine its validity, and for this reason Respondent respectfully draws the attention of the Court to the summary of the facts contained in its counter-statement of the case contained in its original brief. From this it will appear that the Circuit Court was most justified in reversing the District Court and that the District Court's holding the release invalid was "clearly erroneous".

It is clear that Petitioner does not deny that he had had experience in executing previous releases; that he voluntarily approached the Respondent and instituted settlement negotiations; that he knew he had a fractured skull; that he knew the Marine Hospital had discharged

him after several months of treatment with a certificate that his condition was improved and that he would be able to go back to work in a month; that the "Company Doctor" found that he had a fractured skull and was suffering from considerable nervous shock and should not return to work for at least three months; also that the "Company Doctor" found that he would have a 10% permanent disability whereas the Marine Hospital did not predict any percentage of permanent disability; that the "Company" gave him advances to take certain recuperative treatment which Petitioner himself expressed a desire to receive and which Petitioner did receive before instituting settlement negotiations; that while Petitioner did not actually retain an attorney, he had considerable opportunity to do so which he declined.

What Petitioner does however, is to argue vaguely and hypothetically about "mistakes", mistaken misrepresentations, and mistaken medical prognosises which do not appear in the record. Actually, the Marine Hospital discharged Thompson with a diagnosis of a fractured skull and encephalopathy due to trauma. The Marine Hospital predicted that he would be able to go to work in a month. Dr. Farr, the Company doctor, predicted three months. In fact, Thompson went back to work shortly after executing the release, one month before Dr. Farr, the Company doctor, predicted and worked steadily for four years until the time of trial.

Respondent merely asks the Court this question, where is there any evidence of mistaken representation or mistaken prognosis? No one said that Thompson did not have a fractured skull; no one predicted that he would never have pain again; no one predicted that he would never need treatment again. While Respondent hesitates to emphasize facts to this Court, it is clearly in the record that all

admissions to the Marine Hospital subsequent to the time of the execution of the release were for causes unrelated to the assault such as ulcers, urethritis, kidney trouble, and penal sore, with the exception of two outpatient visits to the Marine Hospital at Staten Island, New York, just before the trial where a routine examination of the skull showed that was "no evidence of fracture or pro-longed increased inter-cranial pressure".

Respondent submits that there is absolutely not only no evidence of any mistakes, but that the test as stated in the *Garrett* Case should be the adequacy and nature of the medical advice available to the seaman at the time of the signing of the release. But aside from the facts surrounding Thompson, certainly, the validity of a seaman's release cannot be determined upon the infallibility of competent and impartial medical authority.

The Court will appreciate that in his petition for rehearing, the Petitioner emphasized the non-existent mistake of medical prognosis and steered clear of the fact that Thompson had settled a case of "questionable liability", after approximately five months disability for $4,000.00. In this connection, the Respondent respectfully draws the Court's attention to its discussion of the *Keen and Boudoin* Cases on page 25 of its original brief. The Third Circuit held when establishing the validity of Thompson's release that the *Keen* Case could not be given "ex post facto" effect. But even if the *Keen and Boudoin* Cases are considered to have retroactive effect, there is still the question as to whether Thompson's assailant was the type character who would render the vessel on which Thompson was employed unseaworthy. The only uncontroverted evidence regarding the assailant was that he was effeminate. That the alleged homosexual act occurred prior to the assault was

disputed by Respondent. Again, Respondent asks this Court, as it did on page 29 of its original brief, "Will this Court go so far as to hold a ship unseaworthy if it employs a man who has effeminate characteristics?" Petitioner argues strictly from emotion when it states that Petitioner was a simple minded negro who had a natural aversion to lawyers and who believed in the "Company". (On page 13 of its petition for rehearing.) There is no evidence like this anywhere in the record. This is the sort of argument used by counsel in summation before a jury.

On pages 8 and 9, the Petitioner infers that the amicable settlement of the great majority of seamen's cases is prejudiced by the holding of Thompson's release valid. Respondent submits that if a release entered into under the circumstances existing at the time Thompson signed this release is set aside, that the effect on the amicable adjustment of seamen's claims will be most disadvantageous. It would create more litigation. It would encourage the reopening of settled cases merely because of a few outpatient visits subsequent to executing the release, because that's all Thompson ever did. It would virtually require the retainment of counsel, a private physician, and determination by at least a District Court before a compromise would be effectively terminated. There would undoubtedly be further congestion added to the already crowded State and Federal Courts. It is to the seaman's advantage that he can act freely and independently, that he be permitted to speedily conclude adequate and amicable settlements where the requirements previously established by this Court in the *Garrett* Case have been complied with. Certainly a release obtained under the circumstances here should be considered more than a payment on account.

MICHAEL E. HANRAHAN,
Proctor for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1956

No 1.

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER ON REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM—1956

No. 1

WILLIAM THOMPSON,

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COASTAL OIL COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER ON REHEARING

We believe that the Petition of Petitioner for Rehearing and the Brief for Respondent on Rehearing have clarified the issue to that which the District Court decided, but which the Court of Appeals failed to mention or treat of namely, that of *mistake* as ground for holding a seaman's release for personal injuries invalid.

This issue has on this appeal two aspects, viz.:

(1) Whether *mistake* of the character found by the District Court herein justifies a District Court holding a seaman's release invalid; and

(2) Whether after a District Court holds a seaman's release invalid for *mistake,* the District Court's decision may be reversed without proof and affirmative holding that there was no *mistake* and that the District Court's finding of *mistake* was "clearly erroneous."

The first involves application of the principles of *Garrett* v. *Moore McCormack Co. Inc.,* 1942, 317 U. S. 239, which holds that the burden of proof rests on Respondent

to establish that a seaman's release was fairly arrived at and made by the seaman with full understanding of his rights and for adequate consideration.

The second involves in addition the application of Rule 52 (a), Federal Rules of Civil Procedure, and *McAllister* v. *United States,* 1954, 348 U. S. 19, 20, which holds that:

> "the Court of Appeals may not set aside the judgment below unless it is clearly erroneous" (348 U. S. 20).

Notwithstanding the simplicity of this issue; indeed, lest the real and simple issue be misapprehended, in view of Respondent's prior arguments herein, the Court of Appeals' decision below, and this Court's previous summary decision by equally divided Court, the case, we believe, is one wherein it is peculiarly appropriate that the Court make *before* decision "that intensive study attendant upon opinion writing" usually deferred until after the decisional vote (Cf. *Rice* v. *Sioux City Memorial Park Cemetery,* 1955, 349 U. S. 70, 75).

If Respondent, in its Brief for Respondent on Rehearing (p. 2) seeks now to imply that the reversal by the Court of Appeals was based on holding the District Court's finding "clearly erroneous", we respectfully refer to the decisions in the two lower Courts as showing the contrary. The District Court treated of and found *mistake,* relied on by plaintiff; the Court of Appeals treated of "an absence of *coercion*" relied on by defendant.

We interpret the Brief for Respondent on Rehearing as finally accepting as the issues that of "*mistake*" relied on by the District Court, and that of whether the District Court's findings of "mistake" and of invalidity resulting therefrom were "clearly erroneous".

While this represents a radical shift from Respondent's previous arguments in both appellate Courts, we welcome it as the only just course, and as eliminating "The greatest

difficulty encountered by Petitioner's counsel in the Court of Appeals and here", viz., to focus attention of the appellate Courts upon the issue of *mistake* determined by the District Court (See Petition of Petitioner for Rehearing, p. 7).

We feel justified in pointing out, however, that inasmuch as this was not the basis for the reversal obtained by Respondent below, the case in one where, for greater reason even than in *McAllister* v. *United States, supra,* this Court stands "In relation to the District Court's findings . . . in the same position as the Court of Appeals" (348 U. S. 20, 21). It is, indeed, as though Respondent were appellant here from the District Court's determination; asserting here, for the first time in either appellate court, that the District Court's findings of "mistake" and resulting invalidity are "clearing erroneous".

Under *Garrett* v. *Moore McCormack Co. Inc., supra,* this case is not to be reviewed as one wherein the seaman undertook, and has the burden, to "set aside" the release; but as one wherein Petitioner is emphatically a ward, and wherein Respondent undertook, and has the burden, to prove the validity of the release of the seaman-ward (317 U. S. 248).

The State Court *Garrett* decision in 344 Pa. 69, 23 A. 2d 503, which this Court reversed in 317 U. S. 239, was decided by a Pennsylvania Court, influenced by the Pennsylvania theory against "setting aside" releases. The volume containing the decision of the Court of Appeals herein, 221 F. 2d, at page ix shows that the five judges who voted against rehearing after three voted to reverse are all from Pennslyvania*; and we submit that the reasoning in the

* Judges Kalodner, Goodrich and Hastie, who reversed, and Judges Maris and Staley, who joined them in denying rehearing, are all listed as from Pennsylvania. Chief Judge Biggs and Judge McLaughlin, who dissented, are from Delaware and New Jersey (221 F. 2d, p. ix).

majority opinion employs the Pennsylvania concept of "setting aside" a release instead of really applying the law laid down by this Court in 317 U. S. 239.

The Court of Appeals' majority states that "settlement presupposes a *joint* approximation of the future". But "*joint*" approximation presupposes persons of equal standing before the law, and capable of making a binding "joint" approximation; whereas a "ward" has not this standing and capacity.

In this connection, we respectfully call the Court's attention to the contention in the Petition for Writ of Certiorari herein (p. 10) that the Court of Appeals' decision deviates from and constitutes a threat to the whole guardianship theory respecting seamen and in effect imposes upon injured seamen more harsh rules than those now applied to cases involving releases executed by injured land employees and even by injured passengers and person injured in automobile accidents, including business executives.

For brevity, we do not repeat, but respectfully refer the Court to the citations on page 12 of the Petition and the summaries thereof (pp. 14-19 of the Petition).

The great dissent of Mr. Justice Harlan in *Robertson* v. *Baldwin,* 1897, 165 U. S. 275, 288, 299, maintaining that seamen were within the Thirteenth Amendment, accepted with the majority the guardianship theory, but emphasized that "the necessity for the *protection* of seamen against those who take advantage of them" is inconsistent with making their helpless condition "the excuse for imposing upon them burdens that could not be imposed upon other classes" (165 U. S. 299).

The Brief for Respondent on Rehearing inquires (p. 3) where is there any evidence of mistaken representation or mistaken prognosis. We might more appropriately inquire

where is there any evidence to sustain the Respondent's burden of proving the validity of this seaman's release?

But Respondent's contention that there was no evidence of mistake is (1) contrary to facts found and stated by all eight Judges below (District Judge Hartshorne, and the seven judges of the Third Circuit Court of Appeals); and (2) contrary to the record, including testimony of defendant's own witnesses.

District Court Findings

The District Court opinion states that the facts therein stated shall be considered the findings of fact (Petition for Writ of Certiorari Appendix, p. 25a). It includes the following findings:

> ". . . the testimony clearly indicates the major cause of his neuropsychiatric condition to have been the fractures of his skull by the meat cleaver in the hands of Medina" (*Id.*, p. 16a).
>
> ". . . Meanwhile, Barron, or another agent of the defendant, had had Thompson examined by their Dr. Farr, who reported that Thompson then, in May 1950, would be able to return to work in three months, and had but a 10% permanent disability. This was in fact somewhat similar to the prognosis then made by the hospital itself, which was for a 'good' recovery, and that he would be fit for duty May 29th. But that both Dr. Farr and the hospital were incorrect in their prognosis as to the length and amount of Thompson's mental and neuropsychiatric disability appears quite clear. For instance, not three months, but a year, later, we find him again confined in the Stapleton Hospital, where, among the treatment of other disconnected conditions, we find he had a 'neuropsychiatric consultation', and a year after that, at the New Orleans Hospital, he was diagnosed, among other conditions, as having a

'schizophrenic reaction'. Finally now, three and one-half years after Dr. Farr's examination, Thompson is still receiving out-patient treatment at the Stapleton Marine Hospital, where they recently gave him a head X-ray, obviously in order to ascertain any objective basis for his neuropsychiatric complaints. While the X-ray was negative, Dr. Farr himself admits these complaints are real, not sham. Furthermore, the undisputed testimony shows that Thompson can not serve in his old position as cook, since the heat of the stove so seriously affects the pains in his head, and that he now is acting as a utility or mess man. Not only is this a job of lower rating than cook, but it of course carries substantially lower pay.

"In any event, at Thompson's settlement conferences with Barron, the latter, or defendant's other agent, told Thompson of this prognosis of Dr. Farr, now found to be incorrect, and Barron refused to consider any greater settlement figure than $4,000.00 because he insisted to Thompson that Thompson was practically well then. Barron admits that if he had then known that Dr. Farr's prognosis was incorrect and that Thompson's future would be as serious as it has now turned out to be, he would not have evaluated his case at $4,000.00, but would have told Thompson to get a lawyer before he settled. Barron also told Thompson he thought he had a weak case on liability. For at that time the case of Keen v. Overseas Tankship Corp. (2 Cir. 1952), 194 F. 2d 515, cert. den. 343 U. S. 966, had not been decided, and Barron thought that notice to defendant of Medina's alleged vicious character, a difficult thing to prove, was essential, in order to impose liability on the owner of the ship. But it is clear that this is not the law, and that a seaman can recover if hurt by unseaworthy personnel, in the same way that he can if he is hurt by unseaworthy material, and quite regardless of the ship owner's notice or negligence" (*Id.*, pp. 16a-17a).

". . . In short, it would appear that, as to this matter of Thompson's neuropsychiatric syndrome, or anxiety complex, admittedly real, but a difficult thing at best to either diagnose or prognose, both Dr. Farr and the Stapleton Hospital were much mistaken as to its future effects and continued existence. Had defendant not advised Thompson of Dr. Farr's report or insisted that it was right, and that he was practically a well man, that would have been one thing. . . . But here, to the contrary, not only did Thompson not have the aid of any legal and medical advices of his own, but the defendant, which did have that aid, insisted that its advices were correct, and in essence urged Thompson to settle for an amount now shown to be clearly inadequate, when it turns out that defendant's representations to Thompson as to his condition were, in fact, incorrect. Thus this seaman, in the same inferior position as a ward in dealing with his guardian, was induced to settle for an inadequate sum by the incorrect representations of the other party, in a superior position to him. Such a settlement certainly is not 'fairly arrived at' " (*Id.*, pp. 22a-23a).

Court of Appeals Similar Findings

Respondent stated in its Brief in Opposition (p. 2) filed when the writ was applied for, respecting the Court of Appeals recitation of the facts:

"That Court then applied the facts, as determined by the District Court . . . The Third Circuit Court of Appeals made no new determination of the facts. It took the facts as determined by the District Court, but arrived at a different conclusion of law . . ."

The Court of Appeals opinion of reversal (Petition for Writ of Certiorari Appendix, pp. 6a-12a) does indeed recite:

"Since the signing of the release plaintiff has continued to suffer from the effects of the head blow, having been hospitalized at New Orleans from November 13, 1952, to December 15, 1952, and at Stapleton from February 16, 1954 to February 23, 1954. In fact, Thompson is still receiving out-patient treatment.

"While he has procured work at levels of remuneration and status above and below that which he commanded prior to the assault, it is patent that his injuries have proved more serious than was thought at the time of the release" (*Id.*, p. 8a).

". . . True, the plaintiff is now known to have suffered to a greater extent than was previously thought" (*Id.*, p. 9a).

". . . It is true that the plaintiff did not have independent medical advice of his choosing.

". . . Thompson had been told the success of his case was dependent upon a showing that the defendants had or should have had notice that Medina's presence created a risk of danger to the crew" (*Id.*, p. 10a).

The two dissenting Judges recited:

". . . In this case the negotiator for the shipowner, Barron, told Thompson that Thompson had 'a weak case' both as to measure of damages and the law. As a matter of fact Thompson had suffered more serious injury than his, Thompson's, doctor had realized and Barron's statement to Thompson was probably innocent though it worked damage to Thompson's cause. Thompson is a Negro with but slight formal education, who had suffered a severe head injury and had developed psychoses. DX2 indicates that about the time he executed the release he was in a confused state of mind. As the opinion of this Court reveals, Barron premised his statement that Thompson had a weak

case on the law on the asserted conclusion that he could recover from the shipowner only because of the shipowner's negligence and not on the theory that the ship was unseaworthy because of the vicious propensities of the member of the crew who had attacked Thompson.

"This was not a correct statement of the law even as it existed at the time the release was executed. . . .* Quite apart from history and niceties of language, Barron's statement as to the status of the law was incorrect and if he did not know this he should have for no decided case lay against Thompson.

"Barron's conduct was subject to the inference, which the Court below in effect drew, that he was trying to procure a release from an ignorant and confused seaman on terms most favorable for his client, the shipowner. Barron made use of the sort of language which claim adjustors are accustomed to use when dealing with a claimant with whom they are entitled to negotiate at arm's length" (*Id.*, pp. 1a-3a).

The foregoing facts recited in the opinions of both Courts are such as to sustain the District Court's finding of mistake and resulting invalidity of the release, against any contention that such findings are clearly erroneous.

---

* Act of 1898, 46 U. S. C. § 653, "Complaint that vessel is unseaworthy", provides that crew may apply to the Court for a survey where the vessel is believed to be "unfit in her *crew*, body, tackle, apparel, furniture, provisions, or stores" for an intended voyage. In *The Rolph*, 9 Cir., 1924, 299 Fed. 52, cert. denied *Rolph Navigation & Coal Co.* v. *Kohilas*, 266 U. S. 614, assault by vicious mate on seaman, beating his eyes with a knotted rope until blinded; held vessel unseaworthy under doctrine of *The Southwark*, 1903, 191 U. S. 1. This had been the law before and since 1828. See *McLanahan* v. *Universal Insurance Company*, 1 Pet. (26 U. S.) 170, 183-184.

Some of the Evidence of Mistake

As recited in number 6 of the Questions Presented in the Petition for Writ of Certiorari (p. 4) the record shows that two Marine Hospital records (Galveston 3/25/50, 4/1/50; Stapleton 4/9/50-4/28/50 (R. 318a, 319a)) show "Encephalopathy due to trauma."

Dr. Somberg, a specialist in neurological surgery (R. 120a) and consultant neuro-surgeon at the Stapleton Hospital (R. 121a) testified that encephalopathy indicated brain damage (R. 132a) "means disease of the brain" (R. 131a); and that plaintiff's fractured skull gave rise to organic brain disease as the result of which plaintiff had an anxiety state bordering on the schizophrenic (R. 124a), and that this was caused by this assault (R. 128a). Schizophrenia involved "the broad loss of contact with reality" (R. 152a). The pains, manifesting themselves almost or quite continuously, are very apt to continue throughout plaintiff's life (R. 130a). Prognosis is "poor" (R. 132a). Plaintiff "had a substantial *injury to the brain*"; and Dr. Somberg's "present prognosis" is that "there is an *organic disease of the brain*",* which was caused "by the blows that were rained upon him that day" (R. 134a). "On gross organic examination" plaintiff would appear all right (R. 136a); and when a patient with encephalopathy due to trauma, which little or nothing can be done for, enters the hospital with a duodenal ulcer, the hospital tackles "those parts of the total picture that you can do something for" and the failure of some records to mention the headaches did not mean that they were not present or that the hospital was not aware of them (R. 154a, 155a).

Defendant's Dr. Farr, who was a general surgeon but *not* a neurologist, which involved a highly specialized field (R. 166a), testified that he made an examination of Petitioner in May 1950 to help defendant price the value of the case (R. 165a). He was not sure he saw at that time the hospital record showing encephalopathy due to trauma (R.

167a). He concluded Petitioner had a fractured skull and very considerable nervous shock,* and prescribed three months convalescence period and a 10% permanent disability (R. 158a, 159a). In allowing 10% permanent disability

> "I was allowing really for nervous shock, more than anything else, nervous shock* and, well, memory of what he had been through" (R. 159a).

He testified that opinions differed whether X-rays taken for him the week preceding trial indicated a still existing fracture; he thought not, "but the man who took the pictures for me said *there is still* a faint line of a vertical fracture" (R. 162a).

To inquiry by the Court, he testified: "No, I don't think he is faking, . . . and I think the same symptoms are renewed" (R. 164a).

The claim agent, Barron, testified (R. 264a-265a):

> "Q. Did you discuss this encephalopathy with him?
> A. No, I don't believe I did.
> Q. You had access at that time to the hospital records?
> A. I just had the clinical abstract, not the hospital records.
> Q. And the clinical abstract, does that have anything of the Marine Hospital at Stapleton, Staten Island?
> A. Yes, it does.
> Q. And right there in bold type is encephalopathy due to trauma. That's right, isn't it?
> A. Yes.
> Q. And that we know is not just concussion, is it?
> A. It is not just concussion, no.
> Q. It is brain damage?
> A. By terminology, yes" (R. 264a-265a).

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* Note the difference between Dr. Farr's allowance for "nervous shock" and Dr. Somberg's prognosis of "injury to the brain" and "organic disease of the brain."

He also testified as respects plaintiff's "weak case":

"Q. And as his Honor has just asked you, you communicated that to him, at least that your thoughts were that he had a weak case. Is that right, sir?

A. Yes" (R. 264a).

But he told him Dr. Farr's prognosis, testifying (R. 260a):

"Q. Even at the second meeting did you have any discussion with respect to Dr. Farr's report with Thompson himself?

A. Yes, I did. Well, as I remember it, Dr. Farr found he had a 10 per cent permanent disability of his body and I made that known to Mr. Thompson."

He further testified:

"The Witness: I would have been mistaken if Dr. Farr's prognosis was wrong. My evaluation would have been other than it was.

Q. Your evaluation of the case and the amount that should be paid.

A. And of the consideration, yes" (R. 271a).

"Q. It certainly was not in your mind that this gentleman about two years ago would have to give up being a sea cook, or a cook of any kind, was it?

A. No, it was not.

Q. You expected him to be able to go on or go to sea as a cook or second cook and draw the salary that such a worker gets, is that right, sir?

A. That is right.

Q. Now, of course, if you could have looked forward to the fact that this gentleman was not going to be able to do that but would have to give up cooking at sea because his head would not let him, the pain in his head, and the flashes that came on near the hot stove, would not allow him to go on, you would not have evaluated the case as you did, would you?

A. No, sir, if I thought it was the direct result of injuries sustained on that ship, no" (R. 272a, 273a).

"Q. As a matter of fact, Mr. Barron, you wouldn't have allowed him to take the four thousand dollars, would you?

A. If I could foresee the future and those were the facts" (R. 274a).

"Q. Was the question of notice of the man's vicious propensities necessary in your understanding of the law existing at that time to—

A. It was" (R. 275a).

"The Court: Doesn't it come to this: the understanding of the profession and of you as to the law at the time that you conferred with counsel now turns out to be wrong. You told Thompson wrong innocently, also as it now turns out depending upon how the Court looks at the facts as to the injury, you took Dr. Farr's word, or report, and you told Thompson that he was in a much less serious condition than he now may possibly be, and if that possibility is correct, you, therefore, told Thompson wrong as to the medical fact innocently, is that correct?

The Witness: That is true.

The Court: Therefore, innocently Thompson instead of getting advice from his own side only got advice from the defendant's side which though innocent was wrong. Is that right?

The Witness: It is possible, your Honor. Of course I don't know what advice he got on the outside" (R. 276a-277a).

Mr. Mahoney, the company representative with whom petitioner first talked, did not testify. Petitioner testified (R. 106a) that Mr. Mahoney told him:

" 'Mr. Thompson, the best we can do between the moneys we gave you and what we are about to offer

you will be about four thousand dollars and that is the best we can do *because you are well.*'

The Court: Is that what he said?

The Witness: That is what Mr. Mahoney said.

Q. *Because you were well.*

A. *Because I am well.*" (Italics ours.)

This testimony is wholly undisputed. Plaintiff further testified (R. 108a):

"I said to him, 'That is the best you can do?'

And he said, 'Well, it's not me, it's the insurance people.'

And I said, 'I would like to see that man.'

And he said, 'You will, because you got to go to him to sign your release.'

But now I want to tell you this: if I knew then like I know now, I was suffering then like I am now, I wouldn't have signed no release for nobody; I would have died before I would have done it" (R. 108a).

Plaintiff further testified (R. 110a):

"Well, I didn't have no choice, I signed the release but I didn't know I was going to be sick like this.

Q. You didn't have a lawyer, did you?

A. I had no lawyer, I was depending on *them.*

Q. You didn't have a bit of legal advice from the time you were struck by Medina, struck down on that ship, until you took the money and signed your name to the paper. You never had a lawyer explain to you your rights, did you?

A. Just what Mahoney and this insurance man said to me. They were the only two I spoke to." (Italics ours.)

Conclusions

As the foregoing and a review of the record will disclose:

1. Respondent completely failed to sustain its burden of proving that the seaman fully understood his rights, the extent of his injury, the amount of his damages, the validity of his claim, the value of his claim; or that the seaman had correct medical and legal advice, or that the consideration was adequate (*Garrett* v. *Moore McCormack Co. Inc., supra*).

2. The Respondent completely failed to prove the validity of the release.

3. The proof, both of plaintiff and of defendant, on the contrary, establishes that the Petitioner did *not* fully understand his rights, the extent of his injury, the amount of his damages, the validity of his claim, or the value of his claim; and that Petitioner did *not* have correct legal advice, but was erroneously advised by Respondent; that he did *not* have correct medical advice, nor was there even mentioned or explained to him encephalopathy due to trauma; and that the consideration was *not* adequate in view of his real injuries, damage and legal rights of recovery.

4. The Court of Appeals did not hold and would not have been justified in holding that the District Court's determination of mistake and resulting invalidity of the release was clearly erroneous.

5. The District Judge very carefully handled the case throughout, with complete fairness to both parties; and there was no justification for the Court of Appeals revers-

ing the District Court's judgment (*McAllister* v. *U. S., supra,* 348 U. S. 19).

Respectfully submitted,

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* Examination of Record at following points will show questions by the District Judge to witness Thompson: 56a, 57a, 58a, 59a, 60a, 63a, 64a, 65a, 66a, 67a, 68a, 69a, 73a, 74a, 75a, 77a, 79a, 80a, 82a, 83a, 84a, 85a, 86a, 87a, 88a, 89a, 90a, 93a, 95a, 96a, 99a, 100a, 103a, 104a, 105a, 107a, 111a, 112a, 119a, 181a, 182a, 183a, 184a, 185a, 188a, 189a, 190a, 191a, 193a, 194a, see 197a, 198a, 204a, 205a, 206a, 207a, 209a, 210a, 211a, 237a, 239a.

Witness Barron: 258a, 264a, 269a, 270a, 271a, 276a, 278a, 279a.

Witness Dr. Sonberg: 128a, 134a, 139a, 141a, 152a.

Witness Dr. Farr: 158a, 162a, 163a, 164a, 165a, 168a, 169a, 170a, 171a, 174a, 175a, 176a, 177a, 178a.

the docket for reargument, March 12, 1956. 350 U. S. 985. Reargued October 8, 1956. Decided October 15, 1956.

Per Curiam: The judgment of the United States Court of Appeals for the Third Circuit is reversed and the judgment of the United States District Court for the District of New Jersey is reinstated. MR. JUSTICE HARLAN concurs in the result, but would have preferred to remand the case to the Court of Appeals for determination as to whether the District Court properly found the vessel unseaworthy. MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, and MR. JUSTICE MINTON dissent.

Charles A. Ellis argued the cause for petitioner on the original argument. With him on the brief was *Silas Blake Axtell*. *Silas Blake Axtell* reargued the cause for petitioner. With him on the brief was *Charles A. Ellis*. *Michael E. Hanrahan* argued and reargued the cause and filed briefs for respondent. Reported below: 221 F. 2d 559.

Cert. Reported below: 225 F. 2d 449.

OCTOBER 15, 1956.

Decisions Per Curiam.

No. 1. THOMPSON *v.* COASTAL OIL CO. Certiorari, 350 U. S. 817, to the United States Court of Appeals for the Third Circuit. Argued January 24, 1956. Affirmed by an equally divided Court, January 30, 1956. 350 U. S. 956. Petition for rehearing granted and case restored to

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*[For opinions in this case, see *ante*, p. 1 *et seq.*]